THE NORTHERN PACIFIC RAILWAY AND THE FOREST RESERVES

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CHAPTER I

INTRODUCTION: THE FOREST RESERVE CONTROVERSY UNFOLDED

The forest reserve controversy centered on the question of whether the United States was required to comply fully with a contract which was not fully complied with by the other party, the Northern Pacific Railroad. At stake in the controversy was a considerable area of land which was part of the national forests. The controversy has not been explored in detail to this time, but is a vital continuance of the study of the relationship between the United States and the Northern Pacific, and constitutes the final chapter of the history of the land grant to the Railroad. The study centers on the struggle by the United States to retain certain national forest lands in the face of a 1921 Supreme Court decision awarding them to the Northern Pacific.

The materials used in this study were primarily the extensive hearings before two Congressional Committees which contained tremendous amounts of information about the Northern Pacific and its relationship to the United States, and the court records, statutes, and Congressional documents of the time. Very few newspaper articles and periodicals paid attention to the controversy so little use of them was possible. The early history of the land grant and the early forfeiture movement were well researched and documented by

by historians, and the result of this work was used to a great extent in detailing the early history of the grant. There was, however, no scholarly history of the Northern Pacific written since the book by E. V. Smalley published in 1883. It was necessary to piece together the story of the Northern Pacific after 1883 by consulting many varied sources.

This study intends to establish that the United States had a valid claim to retain the national forest lands despite the Supreme Court decision, and that the final resolution of the case marked a victory for the United States.

A grant of land was made to the Northern Pacific Railroad to aid in building a railroad from Lake Superior to the Pacific Ocean and was a constant source of dispute from 1864, the date of the grant, until the final settlement in 1941. The forest reserve question was the final episode in the long struggle and was one of the few times that the Northern Pacific did not emerge victorious.

The land grant of the Northern Pacific as stated in 1864 consisted of:

> . . . every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each

side of said railroad whenever it passes through any state. . . .[1]

These granted lands were called primary or place lands. To compensate the Northern Pacific for any lands which were disposed of by the United States under the public land laws prior to the definite location of the road, an additional area of alternate sections of land ten miles wide on each side of the grant called the indemnity belt was set aside to be claimed by the Northern Pacific if needed to satisfy the grant.[2] In 1870, additional land was granted in the same quantities as in 1864 for a line to run from Portland, Oregon, to Tacoma on Puget Sound. Also included within this additional grant was a second belt of ten miles beyond the first indemnity limit to replace losses which could not have been satisfied by the original indemnity provision. This second indemnity limit extended along the entire length of the road.[3]

The loss in the primary limit was extensive because of settlement making it necessary to select land in the indemnity limits to fulfill the grant. This indemnity land

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[1] 13 U.S. Statutes 367 (1864).

[2] Ibid., p. 368.

[3] United States Congress, House, Committee on the Public Lands, The Northern Pacific Land Grant, Hearings before Committee, 68th Congress, 1st Session, on H.J.Res. 183, (Part 1 of 5 parts; Washington: Government Printing Office, 1924), p. 99. This will hereafter be referred to as House Hearings.

had to be selected by the Northern Pacific and approved by the General Land Office and the Secretary of the Interior before it was patented to the Company.

The grant was not all one sided as the granting act of 1864 contained a provision which gave the United States the right to reduced transportation charges for all Governmental services. An act was passed by Congress on July 12, 1876, which actually fixed reduced rates for the Governmental traffic--rates which remained in effect until 1941.[1]

The land in question in the forest reserve controversy was set aside by President Theodore Roosevelt by authority of the Forest Reserve Act of 1891. While the acreage involved in the original case was not large, the implications of the case extended far beyond the fate of the 5,000 acres in question. D. F. McGowan, the chief representative of the Forest Service and the driving force behind the Government's efforts to retain the lands summed up these implications well when he wrote:

> There are now within the boundaries of the national forests in Montana, Idaho, and Washington approximately 2,500,000 acres of odd-numbered sections of land within the indemnity limits of the Northern Pacific grant.

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[1] United States Congress, Joint Committee on the Investigation of the Northern Pacific Railroad Land Grants, Hearings Before the Joint Congressional Committee on the Investigation of the Northern Pacific Railroad Land Grants (Part 1 of 15 parts; Washington: Government Printing Office, 1925-1928), p. 448. This will hereafter be referred to as Joint Hearings.

> These lands have been considered by Congress the property of the United States for a great many years. The Government has expended considerable sums of money in their protection and administration. These odd-numbered sections in the national forests checkerboard the adjacent lands therein. Should the Government be forced to give up these lands at this date it would mean not only that their values would be lost to the national forests, but that the value of the remaining even-numbered sections would be lessened by the presence of alienated odd-numbered sections among them. These national forest lands hang in the balance and they should be saved to the United States if it is possible to do so.[1]

Although the forest reserve controversy centered around the control of lands in the indemnity limits of the Northern Pacific land grant, a general investigation of the grant was undertaken in an attempt to retain the lands in question for the United States.

The railroad land grants were the most important of the land laws in their influence on the forest lands as several of the railroad grants included lands in the richest timber region of the United States.[2] The Northern Pacific grant crossed timber lands in Wisconsin, Minnesota, and the timbered areas from Western Montana to the Pacific Ocean. The large area of the grant--as much as sixty miles on each side of the road in the territories--coupled with large timbered areas of the Pacific Northwest meant that many of the forest lands were included in the place limits or

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[1] Ibid., p. 25.

[2] John Ise, The United States Forest Policy (New Haven: Yale University Press, 1920), p. 54.

indemnity limits of the grant. In fact, about three quarters of the Northern Pacific grant or about 33,000,000 acres of land was located in the Pacific Northwest. Over 3,000,000 acres of the grant were heavily timbered.[1]

The forest reserves were set aside in an attempt to save some of the timber resources of the United States. Much of the public domain including most of the best timber lands had already passed into the hands of settlers, speculators, and land grant railroads. In addition, thieves had stolen large quantities of timber from lands which still belonged to the United States. Faulty land laws and failure by Congress to provide for funds to properly protect public timber made the Government helpless to prevent depredation.

The movement which finally culminated in the establishment of the forest reserves began when the Secretary of the Interior under President Hayes, Carl Schurz, made recommendations which were later to become the forest policy of the United States. In his report for 1877, Schurz recommended:

> 'That Congress be requested to enact a law providing for the care and custody of such timber lands as are unfit for agriculture and for the gradual sale of the timber thereon and for the perpetuation of the growth of timber on such lands by such needful rules

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[1]Sarah Jenkins Salo, "Timber Concentration in the Pacific Northwest" (unpublished PhD dissertation, Columbia University, 1945), p. 12.

and regulations as may be required to that end.'[1]

However, Congress was not yet ready to act on the program. William Andrew Jackson Sparks, as Land Commissioner, called attention to the fraud perpetrated under the public land laws. He withheld patents and indicated his intention of enforcing the laws controlling the land grant railroads. The railroads showed their political muscle immediately.

> This stand against the railroads immediately produced an organized movement in Washington to break down the program of reform and to restore the era of 'fraud, favoritism and fees,' as Sparks called it.[2]

Sparks was the victim of this pressure and was dismissed in November of 1887 with his program surviving only a short time longer than he--until April 6, 1888, when the orders were revoked.[3] Sparks had been sacrificed to the railroads but the incident brought the attention of the public to the problems of the public lands and finally forced the Republicans to act.[4]

The reform movement culminated in the passage of the act of 1891, later called the Forest Reserve Act. Its most

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[1] Roy Robbins, Our Landed Heritage: The Public Domain, 1776-1936 (Princeton: Princeton University Press, 1942), p. 287.

[2] Ibid., p. 293.

[3] Ibid.

[4] Ibid., p. 294.

important provision allowed the President to set aside areas of timber lands as national parks.[1] President Harrison wasted no time, creating six forest reservations in 1891-92 and nine more during 1892-93. The next President, Grover Cleveland, favored the forest reserve policy but was concerned with protective legislation for the reserves created by his predecessor. He created two reserves comprising 5,000,000 acres, but waited in vain for the passage of protective legislation before creating more. Congress remained dormant even to the request of the Forestry Bureau for legislation to protect the reserves from fire.[2] Just before he left office, Cleveland proclaimed thirteen new forest reserves encompassing 21,000,000 acres of timber land.[3] Western interests were opposed to the creation of these reserves and attempted to restore them to the public domain by Congressional action, but Cleveland was not intimidated and pocket vetoed the bill.[4] A special session of Congress after Cleveland left office managed to modify the reserves set aside by him. The order creating the reserves was delayed for nine months and other concessions were made to aid miners and farmers in the reserves.[5] These modifications as a result of western dissatisfaction with the

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[1] 26 U.S. Statutes 1103 (1891).

[2] Ise, op. cit., p. 120.

[3] Robbins, op. cit., p. 314.

[4] Ibid., p. 321.

[5] Ibid., pp. 321-322.

reserves only seemed to create more problems. The Forest Lieu Land Act of 1897 designed to aid the settler who was located in a forest reserve actually opened the way for persons to acquire valuable lands. The act provided:

> '. . . in cases in which a tract covered by an unperfected bona fide claim, or by a patent, is included within the limits of a forest reservation the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent.'[1]

The phrase, "or owner", gave railroads the opportunity to exchange worthless land in the forest reserves for other valuable land in another area.

In 1905, the Department of the Interior relinquished control of the forest reserves to the Department of Agriculture which then led the fight to reform the reserve legislation. The Forest Lieu Land Act of 1897 was repealed, thus removing one of the main causes of abuse. Other reforms empowered the Secretary of Agriculture to permit leasing of grazing land in the reserves, and in 1906 permitted the occupation under the homestead laws of lands which were chiefly valuable for agriculture.[2] Despite these reforms, western interests were not satisfied and succeeded in 1907 in ending the President's power to establish reserves by

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[1] Ibid., p. 339.

[2] Ibid., pp. 345-346.

giving this power to Congress.[1] President Theodore Roosevelt negated some of the effect of this action by creating twenty-one new forest reserves before signing the act. This brought the total area in the forest reserves to over 150,000,000 acres in 159 national forests.[2]

The threat to the forest reservations was embodied in a decision by the Supreme Court of the United States in 1921 in a suit brought by the United States to cancel a patent given to the Northern Pacific for 5,681.76 acres of land in Montana. The patent had been issued by mistake for land which was reserved by the President in 1904.[3] This land was located in the Gallatin National Forest and within the indemnity limits established by the act of 1864 granting the lands to the Northern Pacific.

The point in question was not the validity of the Forest Reserve Act of 1891, but rather, whether lands needed to satisfy the grant made to the Northern Pacific could have been appropriated by the United States and included in the forest reserves.

The 5,000+ acres in question in the court case were selected by the Northern Pacific in the prescribed manner. However, the President of the United States had issued a

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[1] Ibid., pp. 348-349. [2] Ibid., p. 349.

[3] United States v. Northern Pacific Railway Company, 256 U.S. 51, 58-61 (1921).

temporary withdrawal order on January 29, 1904, before the land was surveyed, to preserve the land from selection by the Northern Pacific while an investigation was made to evaluate the lands as a possible addition to the forest reserves.[1] The list of selections by the Northern Pacific was forwarded to the Commissioner of the General Land Office on April 7, 1905. The letter which forwarded the list contained the following statement:

> 'We doubt very much whether we should have allowed this list to become of record, for the reason that it is within the limits of the proposed addition to the Gallatin Forest Reserve, but thought best to leave it to your office for action, inasmuch as you could order the list canceled if you desired to do so.'[2]

This original list of selections was examined in the Land Office by an examiner who noted opposite the selections: 'Addition to Gallatin Forest January 29, 1904 (Reserve).'[3]

Another list was prepared from the original list according to the custom of the Land Office and this new list was submitted to the Secretary of the Interior for his approval. This list made no mention of the withdrawal of the land for the forest reserve.[4] The selection was

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[1] Ibid., p. 61.

[2] United States v. Northern Pac. Ry. Co., 264 F. Rptr. 898, 899 (1920).

[3] Ibid.

[4] Ibid., p. 900.

approved and the land patented to the Northern Pacific. On March 7, 1906, an executive order was issued making these lands part of the forest reserves as the error was not discovered for five years. When the discovery was made, the suit was brought for the recovery of the lands.[1]

The case was heard by the District Court with the United States losing the case because of the finding that there was insufficient land remaining in the indemnity limits of the grant to satisfy the losses in the place limits. The special report of the Commissioner of the General Land Office in 1906 showed the grant to be deficient by 4,092,472.99 acres.[2] This meant that the Northern Pacific was entitled to all of the odd-numbered sections of land available in the indemnity limits of the grant at the time of the report.

At the time of the District Court case, D. F. McGowan, the man who led the fight to retain the lands, was at Missoula, Montana, in charge of the legal work of the Forest Service. In the case, there was a stipulation which McGowan felt completely destroyed the Government's case because it stipulated the existence of a shortage in the grant. He contacted his solicitor in Washington twice rec-

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[1] United States v. Northern Pacific Railway Company, 256 U.S. 51, 60-61 (1921).

[2] Ibid., p. 62.

ommending that the case not be taken to court, but his advice was not heeded and he was forced to continue with the case.[1]

In its decision, the District Court said:

> In contracts the United States is obligated to fair dealing, good faith, and honesty even as persons are--more, by way of good example. If the United States deliberately repudiates its contracts why expect its citizens to perform theirs?[2]

Judge Bourquin, in his decision mentioned that the Northern Pacific performed its agreement 35 years before by building the road and now the United States should perform its part of the agreement by conveying the land which was earned but not received.[3] The Judge stated that a deficiency existed and the land belonged to the Railroad.

> . . . that prior to said temporary withdrawal it had been ascertained by the Interior Department that if all the lands of selective character within the indemnity belts, including the lands involved herein were appropriated to defendant's grant, defendant would receive 4,086,000 acress [sic] less than it is entitled to, less than the grant; and that this deficiency exists now.[4]

The United States took the case to the Circuit Court of Appeals which affirmed the judgement of the District Court that the lands were not the property of the United States and that the Northern Pacific was entitled to them.[5]

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[1] Joint Hearings, op. cit., parts 4-5, p. 2012.

[2] Ibid., p. 2990. [3] Ibid., p. 2989. [4] Ibid.

[5] United States v. Northern Pac. Ry. Co., 264 F. Rptr. 898, 909 (1920).

The Supreme Court decided in similar fashion:

> Giving effect to all that bears on the subject, we are of opinion that after the company earned the right to receive what was intended by the grant it was not admissible for the Government to reserve or appropriate to its own uses lands in the indemnity limits required to supply losses in the place limits. Of course, if it could take part of the lands required for that purpose, it could take all and thereby wholly defeat the provision for indemnity. But it cannot do either. The 'substantial right' conferred by that provision (Weyerhaeuser v. Hoyt, supra), cannot be thus cut down or extinguished.[1]

This decision affected far more than the 5000+ acres in Montana. Any lands in the indemnity limits of the Northern Pacific grant from Wisconsin to Washington needed to satisfy the grant were to be made available to the Railroad. It should be noted that the decision only applied if there were a deficiency in the land grant at the time of the temporary withdrawal, for the Court stated that the United States could reserve land in the indemnity limits as long as there were sufficient lands remaining to satisfy all losses in the place limits at the time of the withdrawals.[2] The Supreme Court was not convinced that the evidence presented in the case established the shortage at the time of the temporary withdrawal. The Railroad was entitled to an accurate determination of this question as was the United States, and

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[1] United States v. Northern Pacific Railway Company, 256 U.S. 51, 66-67 (1921).

[2] Ibid., p. 65.

the question was properly the responsibility of the General Land Office. If a shortage existed, it was to be confirmed by the General Land Office and any land which was to belong to the Railroad was to be patented to it. The 1906 report by the Commissioner of the General Land Office to the Secretary of the Interior was not confirmed by the Secretary as required by the Act of March 3, 1887 and thus was not sufficient proof of a deficiency.[1]

Another factor in the case which was still under dispute between the United States and the Railroad was the exact measure of the grant. The correct measure of the grant was the total of the odd-numbered sections in the place limits unless:

> (a) part of the grant included only a moiety of those sections, or (b) the route of this road and that of another with a prior land grant were found to be upon the same general line, in which event a stated deduction was to be made from the amount of land granted to this company. There would be no right to indemnity as respects the moiety not included, nor as respects the lands required to be deducted. Either of those conditions, if existing, would affect the measure of the grant and would have to be considered in determining whether there was a deficiency. The stipulation does not show the presence or the absence of either condition, and the matter is not one of which courts take judicial notice. Therefore the actual situation, whatever it may have been, should have been shown. As this was not done, neither party is entitled to have the question whether there was a deficiency determined upon the present record.[2]

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[1] Ibid., p. 68.

[2] Ibid., pp. 68-69.

The case was then remanded to the District Court to allow the parties an opportunity to ascertain the status of the grant.

The problem facing the United States was very clear. Either the status of the grant would show that at the time of the withdrawals, enough land remained in the indemnity limits to satisfy the grant or the national forest lands would be lost to the Northern Pacific. Unless Congressional action was taken, the matter rested in the hands of the General Land Office which was examining the grant.

The District Court and later the Supreme Court considered only the question of the nonperformance by the United States and did not discuss the question of compliance by the Railroad with its part of the contract. Other factors of past performance by the Northern Pacific other than the fact that the road had been built were not considered. It was these questions--the past performance by the Northern Pacific and the question of the actual shortage in the grant--that gave hope that perhaps the forest reserve lands could be saved. The Supreme Court had directed that the actual status be determined and while the General Land Office was examining the grant, Congressional action was being considered by the Forestry Bureau.

The examination by the General Land Office occupied the remainder of 1921, all of 1922 and was completed in

December of 1923. At that time the Secretary of the Interior reported a tentative finding of a deficiency of 3,900,000 acres. This was somewhat less than the 4,092,472.99 acres of the report of 1906 but still represented a tremendous loss of land in the national forests. This meant that some 2,500,000 acres of land in the forest reserves would have been taken to make up part of the deficiency.[1] Clearly, Congressional action was needed to save the lands in question.

The Congressional phase of the forest reserve controversy began in 1924 with Senate and House Committees deciding to investigate the entire question of the Northern Pacific land grant. A special joint committee was appointed to evaluate the grant and make any recommendations for adjustment which it might consider necessary. After very extensive hearings, the committee recommended that the land be retained by the United States and that judicial proceedings be instituted to effect a final settlement of the entire question of the grant with any award to the Railroad a cash award rather than one of land. These court proceedings were instituted as directed and were not finally settled until 1941. The final result of the judicial phase was retention by the United States of all the land in ques-

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[1] Joint Hearings, op. cit., part 1, p. 25.

tion and the payment of a cash award by the Northern Pacific to the United States. The United States succeeded in preserving the national forests and in circumventing the decision by the Supreme Court in 256 U.S. 51.

The basis of the final settlement was, in part, the evidence of the nonperformance by the Northern Pacific of its part of the contract. In order to evaluate the extent of this nonperformance by the Railroad, it was essential to examine the early history of the grant.

CHAPTER II

THE EARLY HISTORY OF THE GRANT

The General Land Office finding of the shortage reported in 1923 indicated that the only way to save the forest reserves was to delve into the question of nonperformance by the Northern Pacific of its part of the agreement. An examination of the terms of the grant and some of the history of the Northern Pacific helped in the understanding of the position taken by the United States that the Railroad had, in fact, not complied with all the terms of the grant.

The land grant of the Northern Pacific was under attack during much of its early history with the forfeiture movement of the 1870's and 1880's the outstanding example of these attacks. The movement for forfeiture of railroad land grants was a complex one with roots in commercial rivalry and agrarian unrest. The great land giveaway of the 1860's was being reconsidered in the light of railroad practices and scandals. The Northern Pacific as the recipient of the largest grant was the foremost target of those who sought to recover the lands.

Early attempts to regain the lands were aimed at individual railroads, were successful in the case of some small roads, but were frustrated by the larger roads such as the Northern Pacific which managed to protect their grants.

Emphasis was finally given to a measure which forfeited all unearned grants, and after a considerable debate over what constituted an unearned grant, the general measure passed Congress in 1890. Yet, many firm advocates of forfeiture were very disappointed with the measure and considered it a defeat because of its limited scope.

Josiah Perham of Boston was the actual creator of the Northern Pacific. His first attempt was to gain the route to San Francisco, but this move failed as the charters were given to the Union Pacific and Central Pacific Railroads in 1862. Not to be denied in his effort to gain a transcontinental railroad, Perham switched allegiance to the northern route. With the help of Thaddeus Stevens, Perham succeeded in pursuading Congress to pass the Northern Pacific Land Grant Bill on July 2, 1864.[1]

> It was only through the diligence of Perham and his success in lining up many of the prominent capitalists, railroad men, and politicians of the day that the bill was passed. There was no great urgent demand for the passage of the bill other than that created by Perham and his friends. As a matter of fact, the proposition was devoid of anything other than a business enterprise under which Perham sought and obtained an immense land grant to aid him in the construction of a railroad

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[1] United States Congress, House, Committee on the Public Lands, The Northern Pacific Land Grant, Hearings before Committee, 68th Congress, 1st Session, on H.J.Res. 183, (Part 1 of 5 parts; Washington: Government Printing Office, 1924), p. 16. This will hereafter be referred to as House Hearings.

along the northern route.[1]

The charter stated, in part:

> And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget's Sound, with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon. . . .[2]

To aid in the construction of the road, the act granted to the Northern Pacific a 200 foot right of way and alternate sections of public land, twenty per mile on each side of the line in the territories and ten sections per mile through the states.[3] Also, an indemnity belt of ten miles was set aside for replacement of any lands which were not available to the Northern Pacific because of homestead or preemption or to replace mineral lands which were reserved to the United States.[4] This was a presentation of unprecedented size--far greater than any other railroad received. The Northern Pacific was restricted, however, by a provision which prohibited the issuance of mortgage or construction bonds and prohibited a mortgage or lien in any

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[1] Ibid.

[2] 13 U.S. Statutes 366 (1864).

[3] Ibid., p. 367.

[4] Ibid., p. 368.

way.[1] Perham had in mind popular subscription to stock in the railroad to finance construction--a peoples' railroad to the Pacific. This plan to raise money by popular subscription failed and the company was without funds. There was little hope of raising money because of the charter restriction on mortgage and the two year limit for the beginning of construction contained in section 8 of the granting act.

> And be it further enacted, That each and every grant, right, and privilege herein are so made and given to, and accepted by, said Northern Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the whole road by the fourth day of July, anno Domini eighteen hundred and seventy-six.[2]

It was to be very hard to raise construction money because for the first 1,000 miles, the line was projected into vacant territory as far as traffic was concerned. There was no civilized population and no market for the services of the Northern Pacific. The Railroad would have to carry its materials for construction and provide its own work force, and would have to attract settlers to the area to buy its lands and use its services. There were a few settlers in Montana, but there was another wide stretch of uninhabited territory before the settlements of Washington

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[1] Ibid., p. 370.

[2] Ibid.

and Oregon.[1] Potential subscribers saw this situation and were reluctant to invest money in an enterprise which would not pay off for a considerable amount of time.[2]

Perham realized late in 1865 that his plan for a peoples' railroad had failed and the Company was reorganized with a complete turnover of personnel. The new directors, primarily from New England, did not expect to put money into the road as far as actual construction was concerned, but instead planned to get aid from Congress for this construction. The first task which was undertaken was to get an extention of the deadline for beginning construction set to expire July 2, 1866. The reorganization took place in January of 1866 but fortunately Perham had foreseen the inability of the road to meet the deadline and had begun the attempt to get the extension of the time. Hostility to land grants which was beginning to develop made this a difficult task. Again, it was Thaddeus Stevens who pursuaded Congress to extend the time limit for two more years. E. V. Smalley, the historian of the Northern Pacific, said: "The first danger of the forfeiture of the Northern Pacific was bridged over."[3] Again on July 1, 1868, Congress extended the time for commencing and completing construction for an additional

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[1] Eugene V. Smalley, History of the Northern Pacific Railroad (New York: G. P. Putnam's Sons, 1883), p. 183.

[2] Ibid., p. 131.

[3] Ibid., pp.134-135.

two years. The Secretary of the Interior ruled that these extensions made the final date for completion of the Northern Pacific July 4, 1879.[1]

When the provision prohibiting mortgage was removed by the joint resolution of May 31, 1870, the way was clear for the financing of construction.[2] All that was needed was a firm to undertake the raising of the money, and this turned out to be Jay Cooke and Company, the group which steered the joint resolution through Congress. This resolution also changed the main line from the Cascade route to the route along the Columbia River. The terminus of the road still remained on Puget Sound, and a grant of land was included to help finance construction.[3] This was significant because opposition to this measure revealed the two groups into which the opponents of the road were to fall. There were those who for conscientious or political reasons were opposed to land grants and there were those whose interests in other transcontinentals--notably the Union Pacific, the Central Pacific, and the Southern Pacific--led them to

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[1] House Hearings, op. cit., part 1, p. 98.

[2] 16 U.S. Statutes 378 (1870).

[3] James B. Hedges, Henry Villard and the Railways of the Northwest (New Haven: Yale University Press, 1930), pp. 21-22.

oppose a road which would compete with theirs.[1]

Construction work began in July of 1870 at Thomson's Junction in Minnesota, six years after the passage of the enabling act and four years after the original deadline for beginning construction.[2] The road was completed to Bismark in North Dakota in 1873, but it made little progress beyond this point for six years as the firm of Jay Cooke failed in September of that year--part of the Panic of 1873. The road fell into receivership and construction was not resumed until 1879. The railroad was reorganized in 1875 under a plan devised by Frederick Billings. The President of the Railroad, George W. Cass was appointed receiver and the reorganization was completed by the end of August, 1875.[3]

Persons in the Pacific Northwest saw the halt in construction and raised the cry of forfeiture, perhaps in the hope that this would serve as a goad to spur additional building efforts by the road. They had further incentive in that land in Washington Territory which had been withdrawn

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[1] Smalley, op. cit., p. 167.

[2] Ibid., p. 185.

[3] United States Congress, Joint Committee on the Investigation of the Northern Pacific Railroad Land Grants, Hearings Before the Joint Congressional Committee on the Investigation of the Northern Pacific Railroad Land Grants (Parts 2-3 of 15 parts; Washington: Government Printing Office, 1925-1928), p. 1179. This will hereafter be referred to as Joint Hearings.

from settlement pending final selection of the route totaled about 20,000,000 acres. The residents wanted the restricted areas opened to settlement.[1]

The early stages of the forfeiture movement saw the attacks generally motivated by economic reasons--either from competing lines or from competing cities.

The situation changed with the expiration of the time allotted for construction in 1879. The Northern Pacific made attempts in 1874 and 1875 to get help from Congress in the form of a guarantee by the Government of the interest on the bonds issued by the Railroad. When this measure failed, the Company concentrated its efforts on gaining an extension of time for completing the road. Several attempts were made but failed, as the Senate passed a bill in 1876 to extend the time limit for eight years but no action was taken by the House. The measure was carried over into the next session but was not acted upon. Another try was made in December of 1877 when another bill passed the Senate to extend the time for ten years but it was tabled in the House. During the session of 1879-80, the railroad committee in each house reported bills to extend the time but no further action was taken upon them. Thus on July 4, 1879,

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[1] David M. Ellis, "The Forfeiture of Railroad Land Grants, 1867-1894," Mississippi Valley Historical Review, XXXIII (June, 1946), 46.

the Northern Pacific had built 530.5 miles of a projected 2,262.81 miles and it had run out of time.[1]

The session of 1880 passed and the year of grace provided in the ninth section of the Act of 1864 also expired.

> And be it further enacted, That the United States make the several conditioned grants herein, and that the said Northern Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States, by its congress, may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.[2]

Now the question was--what, if anything, was Congress going to do. The problem had been dumped in the lap of Congress by the Supreme Court in the case of Schulenburg v. Harriman, 1874. In this case, a double grant of land had been made to a railroad in Wisconsin which was never built. The Court decided that the granting act in itself conveyed the title to the land--that the land grant was in praesenti. Therefore, there was no automatic reversion of the land because of the failure by the road to fulfill the conditions of the grant.[3]

Leslie Decker suggested:

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[1] House Hearings, op. cit., part 2, p. 162.

[2] 13 U.S. Statutes 370 (1864).

[3] Leslie E. Decker, Railroads, Lands, and Politics: The Taxation of the Railroad Land Grants, 1864-1897 (Providence: Brown University Press, 1964), p. 20.

> It is obvious that this decision, when applied to railroad land grants in general, raised serious doubt about the validity of the contingent right of preemption and made inevitable the so called 'forfeiture movement' of the 1870's and 1880's, a movement aimed at recovering by congressional action the lands of railroads that had not fulfilled the conditions of their grants.[1]

According to the courts, only Congressional action to recover the grants or judicial proceedings authorized by Congress could regain the land. Therefore, pressure was brought to bear on the judiciary committees of both houses as well as the committees on public lands to take action.

The Company, at this time, was pushing completion of the road as rapidly as possible. It was decided to take no further action in Washington in reference to an extension of the time limit, but to devote all efforts to defending the land grant and pushing the completion of the road. E. V. Smalley suggested that the Company was satisfied that Congress would not act as long as the road was being built as rapidly as possible.[2]

The new mortgage of the Northern Pacific through J. P. Morgan in 1881 made it possible for the construction to proceed rapidly and thus served to help ward off attacks on the grant in Congress and elsewhere. The Company claimed that the land grant was not subject to forfeiture, but even

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[1] Ibid.

[2] Smalley, op. cit., pp. 222-225.

if it were: "On the grounds of equity and fair dealing, there should be no attempt to take it away."[1]

Some excerpts from the report of the House Committee on the Public Lands of the 51st Congress, 1st Session (1890) helped in understanding the feelings of Congress on the matter of forfeiture.

> The question of the forfeiture of lands so granted, because of the failure to build 'in time,' had been frequently before Congress, and the extent to which the forfeiture should be declared has been the principal feature of the question.[2]

The report then enumerated the various choices for the recovery of land placed before Congress--first, all lands granted; second, all lands not earned before expiration of time limits; third, all lands not earned at the time of the forfeiture legislation.

> Different views have been held by Senators and Members of the House of Representatives on the question of the power of Congress to declare a forfeiture of lands except those embraced in the third class; and as part of the history of the efforts to secure some legislation on the subject, rendered difficult because of these adverse views, it is deemed proper to state that the Senate, after repeated and full discussion, year after year, has denied the power to declare a forfeiture of any lands except those in the third class, and stood by that position, although the House asserted the power to declare a forfeiture to the extent of the second class, in bills sent to the Senate.[3]

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[1] Ibid., pp. 233-234.

[2] House Hearings, op. cit., part 2, p. 160.

[3] Ibid., p. 161.

The General Land Office in 1888 estimated the amount of land affected by proposal one at 78,500,000 acres; proposal two at 54,000,000 acres; and proposal three at 5,600,000 acres.[1]

By 1871, Congress had discontinued the policy of granting lands to the railroads because of popular pressure. The Republican platform of the next year contained a measure against additional grants--an idea which the Democrats had already accepted.[2] In 1884, an additional step was taken in regard to the land grants when both major parties included forfeiture plans in their platforms following the way shown by the farmers and laborers.[3] Yet the agents of the railroads were able to prevent the adoption of the forfeiture legislation for six more years. The Republicans, in any case, were only halfhearted supporters of forfeiture, as they wished to recover only the lands where there had been no attempt to fulfill the conditions of the grant. This was of no real threat to the Northern Pacific for by this time the road had been almost completely built.

The possible target for Congressional action was a

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[1]Ellis, in Mississippi Valley Historical Review, op. cit., p. 52.

[2]Ibid., p. 38.

[3]Donald Johnson and Kirk Porter, National Party Platforms 1840-1964 (third edition; Urbana, Illinois: University of Illinois Press, 1966), p. 73.

large one. It was estimated that about 100,000,000 acres were subject to forfeiture along with an almost equal amount of indemnity land which had been withdrawn from settlement pending selection by the railroads. It was little wonder that the homeseeker moving west wished to see the railroads lose the land.[1] In addition to this, only about half of the more than 80 land grant railroads constructed their roads within the required time including Congressional extensions.[2] In 1880, Secretary of the Interior, Carl Schurz, listed 19 roads including the Northern Pacific as being incomplete.[3]

In 1880, a bill was introduced to forfeit all lands not earned by construction. It was estimated that this bill would have restored 106,500,000 acres to the public domain, but the supporters of the railroads succeeded in killing the bill.[4] In 1882, 1884, and 1886, attempts were made to secure forfeiture of the unearned grants. It was in the case of the bill of 1884 that the essential difference in the position of the Senate and the House became apparent--a

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[1] David M. Ellis, "The Forfeiture of Railroad Land Grants" (unpublished Master's thesis, Cornell University, 1939), p. 34.

[2] Ibid., p. 40.

[3] Ibid., p. 54.

[4] Lewis H. Haney, A Congressional History of Railways in the United States, 1850-1887 (Madison: Bulletin of the University of Wisconsin, 1910), pp. 25-26.

difference which held true until the House gave in to the Senate in the bill of 1890.

Popular sentiment for forfeiture grew rapidly during the 1880's. The farmers and land speculators complained of land monopoly, high prices, tax evasion, and political corruption. In the western part of the country during the nineteenth century, land and the improvements on it were the principal sources of tax revenue, and in the area west of the Mississippi, the railroads held a significant portion of the land.[1] The railroads were able to avoid paying taxes on the land by delaying the selection and patenting of the lands. The Supreme Court had held that the title to land granted to the railroads by Congress did not vest in the railroad company until it had been formally certified and patented. Therefore, the lands could not be taxed by the states while they were public lands and did not belong to the railroads. The railroads delayed the patenting process as long as possible to avoid paying taxes. In addition, the lands were often made the basis of mortgage bonds so the railroads were enjoying the benefits of land ownership without the responsibilities. The railroads often sold the lands in advance of patenting. This appeared to have reached a climax about 1886 in the case of the Northern

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[1] Decker, op. cit., pp. 6-7.

Pacific.[1] Westerners who recognized these situations sometimes advocated forfeiture as a way of removing these evils.

It seemed inconsistent for the Supreme Court to declare ownership in terms of title contained in the granting act but yet not make the railroads pay taxes on the lands.

The presence of railroad land grants also raised the price of government lands, for the base price for lands in the even-numbered sections was set at a minimum of $2.50 per acre. This meant that not only were large amounts of land withdrawn from settlement but that large areas of land were only offered at an increased price.

Other practices of the railroads, particularly in the Pacific Northwest, brought dissatisfaction and channeled discontent toward the railroads. Such practices as long and short haul rates, rebates, and monopoly tactics angered many persons who saw forfeiture as a way to get back at the "monsters."

In May of 1883, Villard raised the price of lands west of the Missouri River.[2] This produced a great reaction in Washington Territory where the citizens pressed for the forfeiture of the Cascade Division land grant. They sent a

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[1] Haney, op. cit., pp. 181-182.

[2] Ellis, in Mississippi Valley Historical Review, op. cit., p. 49.

lobbyist to Washington to try to obtain this goal, and it seemed apparent that the majority of citizens of Washington Territory favored forfeiture after 1883. The Northern Pacific frustrated the goal and removed the tempting target by completing the Cascade Division in 1887. This seemed to have removed the opposition as there was little interest shown in Washington when Congress recovered the land grant between Wallula and Portland in 1890.[1]

The real climax of the forfeiture movement occurred in 1886. The original issue of the battle of 1886 was the fate of the lands opposite the 75 miles of the Cascade Division which was uncompleted. The Northern Pacific was apparently willing to give up the land between Wallula and Portland as a sop to public opinion but was not willing to give up the land along the Cascade Branch. It was similarly concerned about the possibility that Congress would attempt to take all lands not earned within the time limit. These fears were confirmed when the House passed a bill to do just that. According to the measure, the Northern Pacific was to forfeit all lands not earned by July 4, 1879. The popularity of the measure was indicated by the voting, 184-52. The Senate was content, however, to pass only the measure for the Cascade Division. Neither side would give in in confer-

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[1] Ibid., pp. 49-50.

ence and a solution was not found. The controversy on this particular topic was ended by the completion of the Cascade Division in 1888.[1]

The House Committee on Public Railways declared that the renewal of the Northern Pacific grant by failure to act:

> . . . simply amounts to a building of the road by the government, presenting it to the company when completed, and giving them a bonus of about $45,000,000 for accepting the present.[2]

The House took action by giving forfeiture bills a privileged place on the calendar on January 21, 1884, a step which made it more difficult for opponents of the reformers to delay legislation.[3] Certain limited forfeiture bills were approved during the period from 1884-1887, as Congress succeeded in rescuing approximately 28,000,000 acres for the public domain by reclaiming the land of several railroads--the most notable being the Texas and Pacific and the Atlantic and Pacific.[4] The other roads with large grants managed to protect their interests, largely through the actions of the Senate.

The general trend of the forfeiture movement during and after 1888 was away from specific railroads and toward a bill to recover all lands of all railroads which had not

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[1] Ibid., pp. 50-51.

[2] Ellis, in "thesis", op. cit., p. 55.

[3] Ibid., pp. 57-58.

[4] Ibid., p. 60.

earned them by construction. The House began to waver in 1889 when it began to feel that the Senate would never give in and that some recovery, even if very little, was better than none. In 1890, the House capitulated and passed the Senate bill. The importance of this decision to the Northern Pacific can be seen by the estimates of the land which would have been affected by the various measures proposed. The first proposal would have cost the Northern Pacific the entire grant; the House idea about 36,907,741 acres; and the Senate proposal about 2,000,000 acres. In the end, the Northern Pacific lost about 2,000,000 acres of the total.[1] By further adjustment at later times including the forest reserve controversy, the Northern Pacific received, in the final analysis, 39,843,053 acres.[2]

The general forfeiture bill of 1890 did not greatly affect the Northern Pacific land grant because it took nothing from the Railroad except land which it had never earned by construction (Figure 1).

Congressman Holman charged on the floor of the House that the act was actually a Northern Pacific measure designed to placate the people and forestall a more drastic measure.[3] The Northern Pacific strategy of delaying action

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[1] Ibid., p. 129.

[2] Ibid.

[3] Ellis, in Mississippi Valley Historical Review, op. cit., p. 51.

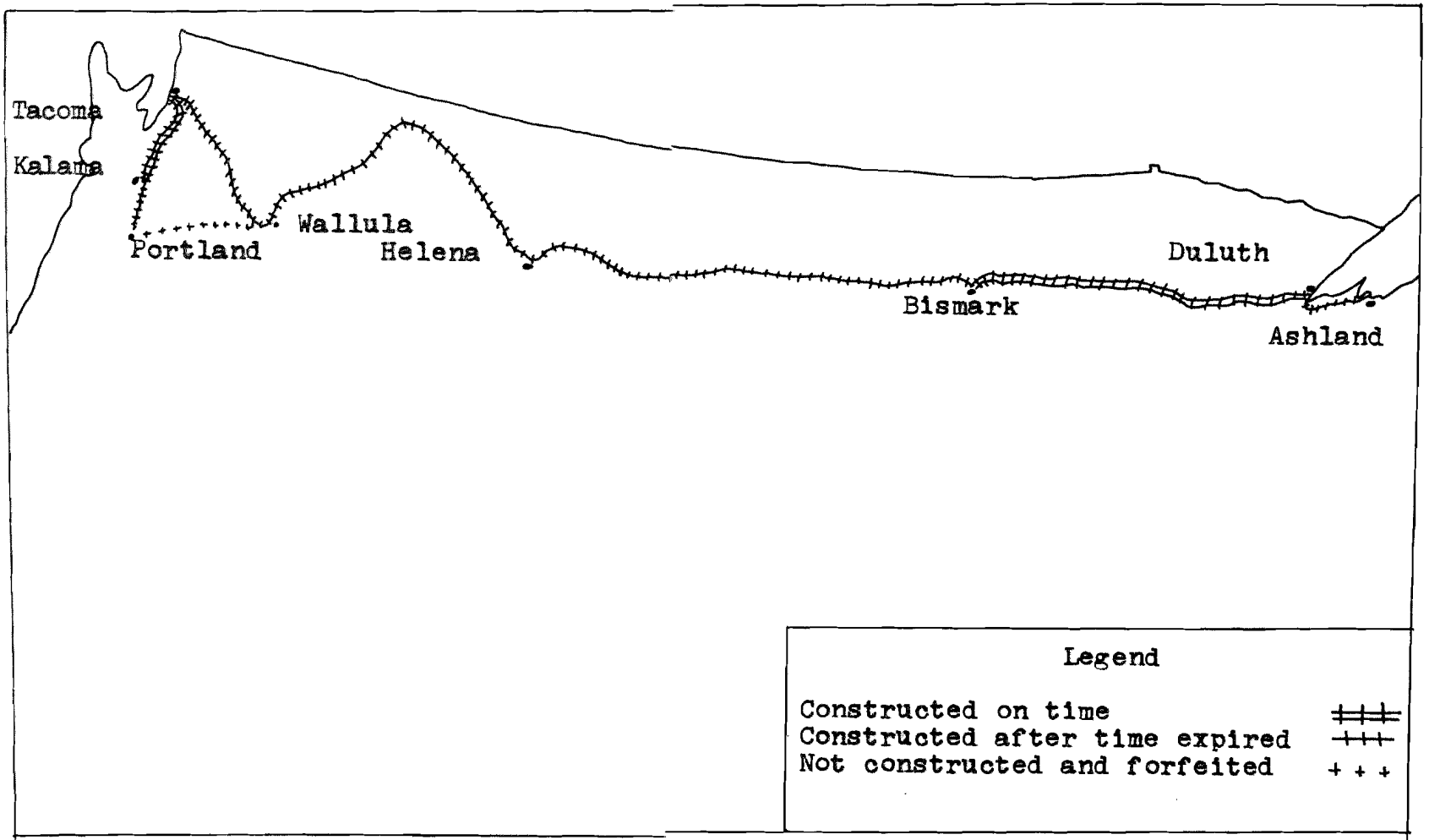

Figure 1. The failure by the Northern Pacific to complete the construction of the road in the time specified by Congress. (From Joint Hearings.)

by Congress while pushing construction of the road was very successful. The House was not content with the measure of 1890 and revived its own bill in the sessions of 1892 and 1894, but the Senate refused to reconsider. Forfeiture was dead until it was again brought to life in connection with the forest reserves.

A careful examination of the issues would have revealed the increasing difficulty of forfeiture as the years passed. As the railroads disposed of the lands, forfeiture would have injured increasing numbers of settlers who had purchased the land in good faith. The railroads would also have been injured because their capital was raised by mortgages and bonds issued with the grant as security. A collapse of railroad credit which might have followed could have completely defeated the original goal of Congress, that is to secure the building of adequate transportation in advance of settlement to join the east and west. In the case of the Northern Pacific, it seemed that the movement in Congress to forfeit the grant helped to push the Railroad into more rapid building. The exact effect was difficult to measure but the directors of the Northern Pacific were well aware that the completion of the line would have removed many of the opponents of the road from the ranks of the forfeiture movement. The events in Washington Territory with the Cascade Division followed this pat-

tern with the residents of the area losing their interest in forfeiture when the division was completed. It thus appeared that although the movement did not reclaim large portions of land, it did succeed in pushing railroad construction at a more rapid rate.

The Northern Pacific again faced financial troubles in 1893. The Panic of 1893 and other troubles cut revenues to the point where they were just paying operating expenses. Receivers were appointed for the road in August of 1893 and remained in control until reorganization in September of 1896.[1] This involved the transfer of the Northern Pacific Railroad to a corporation organized under the laws of Wisconsin as the Superior and St. Croix Railway in 1870. It changed its name to the Northern Pacific Railway Company and purchased the Northern Pacific Railroad Company at a foreclosure sale.[2] From that time on, the Company was properly known as the Northern Pacific Railway Company, but as the names were so similar, they were used interchangeably.

The early history of the grant showed that the Northern Pacific had faced threats to its grant and had thwarted almost all of them. The forfeiture movement, although the greatest threat, had not succeeded in taking

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[1] Joint Hearings, op. cit., Parts 7-10, pp. 4639-4641.

[2] Ibid., Part 1, pp. 520-521.

anything of consequence from the Railroad for it had only given up land it had no intention of earning by construction. It was clear that the road was not completed in the time allotted under the authorizing act and its extensions. Why then should the United States have been required to complete its share of the contract when the Railroad had not complied with its share? Persons in the Departments of Agriculture and Interior, and the President of the United States asked the same question and they requested Congress to examine the entire grant with the idea of saving the forest lands from selection by the Railroad. The Supreme Court in 1921 had not considered the nonperformance by the Northern Pacific; but if Congress could be pursuaded to investigate the grant, perhaps the issue could be resolved in favor of the United States. The action could take the form of a Congressional forfeiture of the lands or the institution of a court action by Congressional mandate to save the lands. The final action was a combination of the two methods.

CHAPTER III

THE CONGRESSIONAL PHASE: PART I

The evidence of nonperformance by the Northern Pacific was presented to Congress which conducted the investigation of the grant by appointing a special committee to hear the testimony. The matter rested in the hands of Congress from 1924 until the passage of legislation in 1929 authorizing the institution of a suit in the courts to finally settle the controversy. The first part of the Congressional phase involved testimony on matters which involved errors in the administration of the grant and succeeded in retaining 1,300,000 acres of the forest lands for the United States. The Committee reached no specific conclusions on the individual points but the general conclusions embodied in the legislation in 1929 and the comments made by individual members during the hearings support the contention that the Northern Pacific failed to live up to its contract.

The representative of the Forest Service, D. F. McGowan, set out on a crusade to gain the attention of Congress and persuade it to hold an extensive investigation of the entire grant with the goal of retaining some or all of the lands. He was asked if it were essential for Congress to investigate the grant rather than giving the matter to an

administrative body.

> You have got bodies that can make inquiries, but you have no bodies that can take action after the inquiries have been made. As Senator Walsh knows, you can not declare a forfeiture--the administrative officers could not do that. You have got to have the action by Congress.[1]

McGowan had been involved in the earlier phases of the case which ultimately reached the Supreme Court in 1921 as 256 U.S. 51. At the time of the court decision, McGowan was at Missoula, Montana, with the Forest Service. His boss, Colonel Greeley, happened to be visiting at the time of the decision and was interested in some of McGowan's ideas about saving the forest lands. Greeley requested that McGowan come to Washington, D. C., and begin work on his ideas. Both of these persons saw that the answer to their problem was not to be found by looking at the acreage of the grant but that other areas needed to be explored. On July 12, 1923, McGowan filed a brief with the General Land Office which touched on some of the possible areas in which the grant could have been investigated.[2] The basic idea behind the brief was to examine the performance by the

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[1] United States Congress, Joint Committee on the Investigation of the Northern Pacific Railroad Land Grants, Hearings Before the Joint Congressional Committee on the Investigation of the Northern Pacific Railroad Land Grants (Part 6 of 15 parts; Washington: Government Printing Office, 1925-1928), p. 3116. This will hereafter be referred to as Joint Hearings.

[2] Ibid., parts 4-5, pp. 2014-2015.

Northern Pacific of its part of the contract. The Memorandum of July 12, 1923 was concerned with 4 points which were later expanded into the 22 points of the letter of January 12, 1924.

> (a) The failure of the Northern Pacific to dispose of its lands upon the foreclosure of the mortgage authorized by the joint resolution of May 31, 1870.
> (b) The failure of the Northern Pacific to dispose of the lands of the grant at prices not exceeding $2.50 per acre, as required by the joint resolution.
> (c) The erroneous selection of approximately 1,300,000 acres of land in the second indemnity limits of its grant by reason of the Crow Indian Reservation.
> (d) The excess acreage the Northern Pacific has received through the State of Washington, amounting to approximately $1,500,000 [sic] acres.[1]

There was no significant response from the Land Office and McGowan later stated:

> . . . I think the Land Office regarded this case as a controversy primarily between the Forest Service and the Northern Pacific Railroad Co.; that we were in the nature of adverse claimants, each contending for certain propositions, and that it was the function and duty of the Land Office to sit in a judicial capacity to hear the questions presented and to decide accordingly.[2]

McGowan explained that he was not being critical, but it seemed that he was not going to receive much assistance from the Land Office.

A letter, prepared by McGowan, was sent to the

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[1] Ibid., parts 7-10, p. 3579.

[2] Ibid., parts 4-5, p. 2015.

General Land Office on January 12, 1924, over the signature of E. A. Sherman, the Chief Forester, setting out the Forestry Department's reply to the tentative 3,900,000 acre shortage found by the Commissioner in 1923.[1] In this letter, McGowan stated:

> I am satisfied that you will agree with me that whatever the deficiency, if any, may be, it can not be other than a deficiency in form and not in substance in view of the many concessions that have been made by the United States to the Northern Pacific and the resulting benefits thereof.[2]

Sherman, Colonel Greeley, and McGowan consulted Secretary of Agriculture, Henry C. Wallace, who supported the position of the Forestry Department and presented the matter to Secretary of the Interior, Hubert Work. Wallace and Work then directed letters dated February 12, 1924 to N. J. Sinnott, Chairman of the House Committee on the Public Lands and I. L. Lenroot, the Chairman of the Senate Committee on Public Lands and Surveys, suggesting that the entire grant be subjected to inquiry.[3]

> The decision of the Supreme Court was based upon the record before it. It did not take into consideration, and properly so, many questions of law and fact which arise in connection with the grant and which would be germane to an inquiry made in connection therewith by Comgress.
>
> There are large public interests involved, and to the end that Congress may have opportunity to

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[1] Ibid., p. 2016.

[2] Ibid., part 1, p. 27.

[3] Ibid., pp. 7-8.

> consider the matter, a proposed joint resolution is transmitted herewith for your consideration.[1]

The departments managed to convince the President of the United States, Calvin Coolidge, to join the crusade. Coolidge wrote to Sinnott on February 23, 1924:

> The United States has granted lavishly of its public resources to aid the extension of transportation facilities, and thereby the economic development of the Western States. No question as to the wisdom of that policy is involved in this issue. Nor is any question involved as to the legal and moral obligation of the Government to discharge in full the contractual obligations which is assumed for the accomplishment of the public benefits. That the legal and equitable claims of the grantee should be fully weighed and safeguarded goes without saying. But it is still more imperative that the interests of the public, both in the possession and conservation of valuable natural resources and in the accomplishment of the purpose from which the grant was made, be adequately protected in an equitable settlement of this question.[2]

A joint resolution was introduced into both Houses authorizing the Secretary of the Interior to withhold adjustment of the grant while Congress conducted an investigation, and it was referred to the House Committee on the Public Lands and the Senate Committee on Public Lands and Surveys. The House held extensive hearings on the question to determine whether a committee should investigate the grant, actually investigating some of the points of controversy while deciding whether to recommend the establishment

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[1] Ibid., p. 8.

[2] Ibid., pp. 5-6.

of the joint committee. The House Committee voted unanimously for the investigation as did the House of Representatives when the joint resolution came before it.[1] The Senate Hearings were held after those of the House and involved mostly a discussion of how long to suspend the adjustment of the grant. The House had provided for absolute suspension of all patents under the grant for three years and the appointment of a committee of ten for the investigation, but the Senate was reluctant to suspend the grant for that length of time.[2] The Senate insisted on a shorter length of time and the House gave in agreeing to postpone adjustment for two years until March 4, 1926.[3]

The general position of the Northern Pacific was made clear during the Senate Hearings by C. W. Bunn, Vice President and General Counsel of the Railroad.

> The Northern Pacific Co. would not object to a law which kept these forest reserve lands in the hands of the United States, and referred it to the courts to determine what compensation, and whether any compensation, the Northern Pacific was entitled to for the appropriation.[4]

This was the form that the final settlement took.

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[1] Ibid., part 6, p. 3101; United States Congress, House, Committee on the Public Lands, House Report #512 (Washington: Government Printing Office, 1924), p. 5.

[2] Joint Hearings, op. cit., part 6, p. 3095.

[3] Congressional Record (Washington: Government Printing Office, 1924), Vol. 65, part 10, p. 10160.

[4] Joint Hearings, op. cit., part 6, p. 3118.

The resolution of June 5, 1924, directed the Secretary of the Interior to withhold approval of the adjustment of the Northern Pacific land grant until March 4, 1926 and withhold the issuance of any patents until after the Congressional investigation. The approval was to be withheld after March 4, 1926, only if the matter was being considered by the courts. If that were the case, approval was to be withheld until final settlement of the case.[1]

The joint resolution also instructed the Secretary of the Interior to advise Congress of the status of the grant and recommend any action which he believed necessary.[2]

The investigation of the grant required more time than was envisioned and the suspension of the adjustment was extended to June 1, 1928.[3] Again in 1928, because Congress was not ready to act on the proposed bill for final settlement, the adjustment was postponed until June 30, 1929.[4]

The primary guidelines for the House investigation were the 22 points submitted by McGowan in the letter of January 12, 1924. In fact, the entire investigation of the grant and the subsequent judicial phase which emerged were

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[1] 43 U.S. Statutes 461 (1924).

[2] Ibid., pp. 461-462.

[3] Congressional Record (Washington: Government Printing Office, 1927), Vol. 68, part 4, p. 4372.

[4] Congressional Record (Washington: Government Printing Office, 1928), Vol. 69, part 9, p. 9732.

based upon the 22 points compiled by McGowan and submitted by Sherman. As the points were so important, they were worth careful examination and explanation. The suggestions were in two areas; one suggested modifications in the tentative adjustment by the General Land Office, and the other included factors which were not considered by the Court but which merited further investigation and possible action by Congress. For the purpose of clarification and examination, the points will be divided into these groups but the numbers will correspond to those in the original letter. The adjustments are discussed in this chapter; the remainder in the following chapter.

Before the first meeting of the Joint Committee, William Spry, the Commissioner of the General Land Office, wrote a letter to the Secretary of the Interior on March 5, 1925, setting out the adjustment required by the joint resolution of June 5, 1924.[1] The Secretary of the Interior examined the letter from Commissioner Spry and made his own recommendations, as required by the joint resolution, in a letter of March 25, 1925, to N. J. Sinnott, the Chairman of the Joint Committee.[2] As the various points of the Forester are discussed in this chapter and the succeeding one, the

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[1] Joint Hearings, op. cit., part 1, p. 372.

[2] Ibid., part 1a, p. 683.

points of view of the four major parties of interest--McGowan, the Northern Pacific, Commissioner Spry, and the Secretary of the Interior--will be brought out.

One point that should be clearly evident in the points discussed in this chapter is the number of errors in the administration of the grant which were made by the General Land Office and identified by McGowan.

1. To show that mineral losses in the primary limits may not be satisfied in the second indemnity limits of the grant, except in Wisconsin, Minnesota, and Oregon.
2. To show that lands in the second indemnity belt may be selected only for losses sustained in the primary limits between July 2, 1864, and the date of the definite location of the road.
3. To show that if on the date of the forest withdrawals covering the lands in the second indemnity belt there were in the second indemnity belt sufficient lands, other than the withdrawn lands, to satisfy such losses that could lawfully be satisfied in the second indemnity belt, the forest withdrawals therein were valid, applying to the second indemnity belt the rule you have applied to the first indemnity belt.[1]

The land grant of 1864 included a provision for the selection of lieu lands in the event that lands in the primary limits were not available to the Railroad. These first indemnity limit lands were used to satisfy losses which occurred up to the time of the definite location of the road and were made anywhere along the line of the road. The land grant of 1870 included a second indemnity limit with differ-

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[1] Ibid., part 1, p. 26.

ent provisions for selection. The lands selected in the second indemnity limits had to be in the same state or territory where the loss occurred and the loss must have occurred after July 2, 1864 and before the definite location of the road.[1] The Supreme Court in 256 U.S. 51 made no distinction between the first and second indemnity limits when it discussed the question of a deficiency in the grant. Because of the different provisions in regard to the two indemnity limits, McGowan determined that perhaps it was possible to save some of the lands in the second indemnity limits by confining the selections by the Northern Pacific to the first indemnity limit.

Section 3 of the act of 1864 provided in part:

> That all mineral loands [sic] be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agriculture lands, in odd-numbered sections, nearest to the line of said road and within fifty miles thereof, may be selected as above provided.[2]

The act of 1864 provided for a grant of twenty alternate sections of public land on each side of the road through the territories and ten alternate sections of public lands through the states. This made a strip forty miles wide through the territories and twenty miles wide through the states. When the first indemnity limits of the grant

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[1] 16 U.S. Statutes 379 (1870).

[2] Joint Hearings, op. cit., part 1, p. 374.

were added, the belt of land was fifty miles wide through the territories and the second indemnity limit was outside the fifty mile limit set for the selection of mineral lands, in areas which were territories at the time of the granting act. The only states in 1864 were Wisconsin, Minnesota, and Oregon, so all the rest of the road was located in the territories.[1] Therefore, the Northern Pacific was not permitted to make mineral indemnity selections in the second indemnity limits except in the states. According to calculations made by the Secretary of the Interior, approximately 1,000,000 acres of national forest lands in the second indemnity limits were not under the rule laid down by the Supreme Court in 256 U.S. 51.[2] The Northern Pacific insisted that there was no material controversy on any of these three points as they were clearly stated in the laws granting the lands.[3] Point 2 was clearly handled by the act of 1870 which stated that losses in the second indemnity limit were restricted to those which occurred after July 2, 1864 and up to the definite location of the road.[4] Point 3 was clearly evident by applying the decision of 256 U.S. 51

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[1] Ibid., parts 7-10, pp. 5109-5110.

[2] Ibid., pp. 4220-4226.

[3] Ibid., parts 11-12, p. 5432.

[4] Ibid., part 1, p. 374.

to the second indemnity belt.

The 1,000,000 acres mentioned would not appear in any adjustment of the grant, but were still saved to the national forests because the Northern Pacific was not permitted to select them.

4. To deduct from the Northern Pacific grant the area of conflict with the Portage, Winnebago and Superior Railroad--370,378.05.[1]

The Supreme Court in 256 U.S. 51, stated:

> The aggregate of the odd-numbered sections within the place limits is the correct measure of the grant, unless (a) part of the grant included only a moiety of those sections, or (b) the route of this road and that of another with a prior land grant were found to be upon the same general line, in which event a stated deduction was to be made from the amount of land granted to this company. There would be no right to indemnity as respects the moiety land included, nor as respects the lands required to be deducted.[2]

The land grant to the Portland, Winnebago and Superior Railroad (Wisconsin Central) was made on May 5, 1864 to the State of Wisconsin; and this grant was prior to the granting act of July 2, 1864, made to the Northern Pacific. Both of the railroads filed maps of definite location between Ashland and Superior, Wisconsin; the Portage, Winnebago and Superior on November 10, 1869, and the Northern Pacific on

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[1] Ibid., p. 26.

[2] United States v. Northern Pacific Railway Company, 256, U.S. 51, 68 (1921).

July 5, 1882 and November 20, 1884.[1] According to the law applied to railroad grants, the filing of a map of definite location withdrew the lands for the railroad which filed the map. According to 256 U.S. 51, point (b) applied and the land should have been deducted from the grant. The Northern Pacific actually built its road--completing it on February 6, 1885; but the Portage, Winnebago and Superior line was never built from Ashland to Superior. The lands which had been withdrawn from entry were forfeited under the provisions of the general forfeiture act of 1890 and restored to the public domain.[2] The lands were not to go to the Northern Pacific because the act of 1890 provided:

> That no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any State or corporation to which lands may have been granted by Congress. . . .[3]

The Northern Pacific took the position that the Northern Pacific line was not upon the same general route as the Portage, Winnebago and Superior, but at almost right angles to it; the only case where the roads were on the same general route was the short distance east of Superior and this did not justify the deduction (Figure 2). In addition, the total land granted between Superior and Ashland was only

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[1] Joint Hearings, op. cit., parts 4-5, p. 2159.

[2] Ibid., p. 2160.

[3] 26 U.S. Statutes 498 (1890).

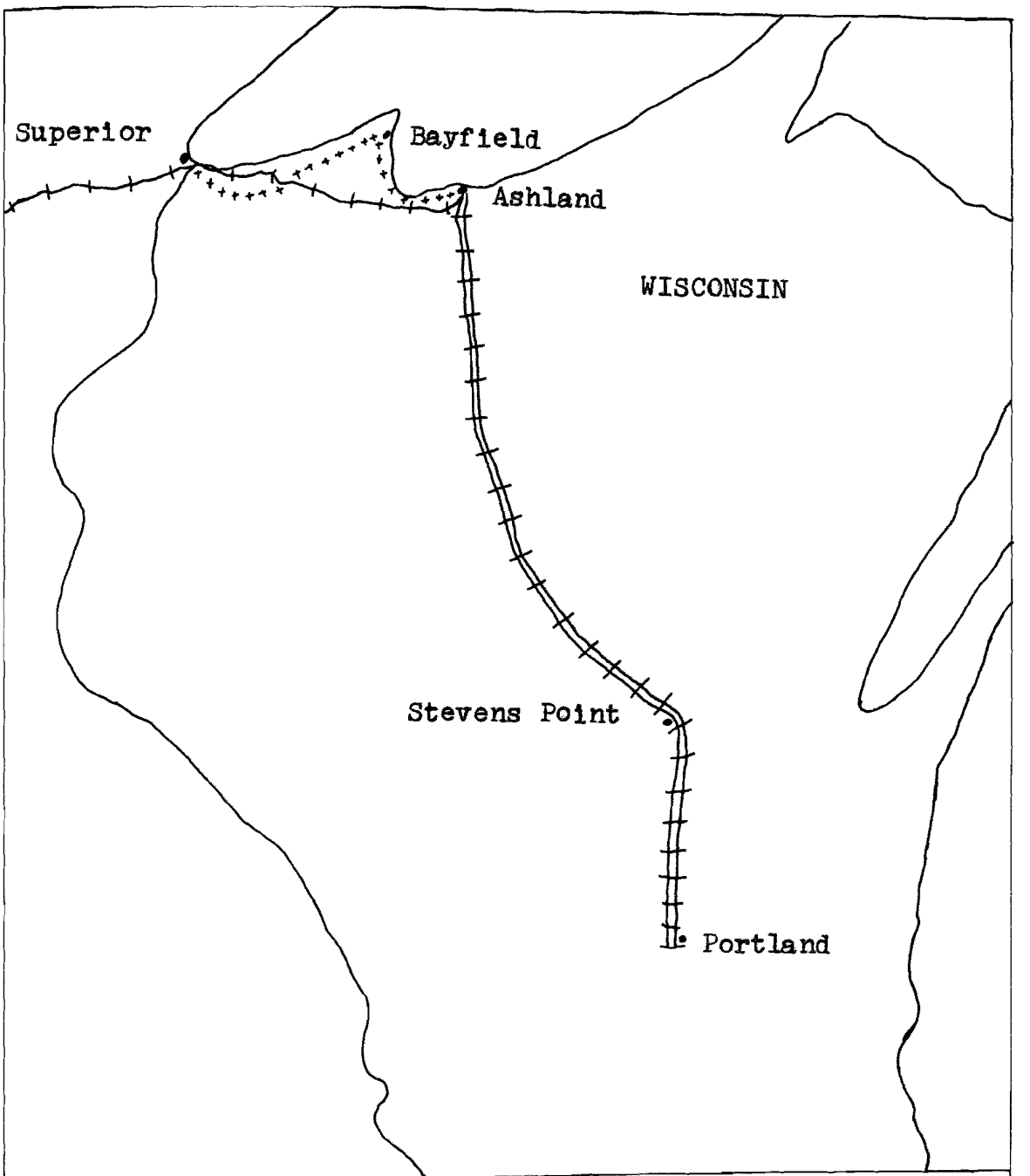

Figure 2. The Northern Pacific and the conflict with the Portage, Winnebago and Superior Railroad. (From Joint Hearings.)

113,791.70 acres.[1] The Northern Pacific also contended that to accept the reasoning of McGowan would have overturned a decision by Secretary of the Interior, Hoke Smith, in 1895 (21 Land Decisions: 412,417), which held:

> As the Wisconsin grant was the older by two months, if the road thereunder had been built, [italics added by the Railroad] it would have been entitled to all of the odd-numbered sections within the lapping limits of the two roads, to the exclusion of the Northern Pacific.[2]

The Northern Pacific conveniently overlooked the section of the decision in which Smith stated:

> It will be noted also, by reference to the map, that the line of this road, as definitely located, is for a considerable, if not for the whole, distance between Bayfield and Superior City 'upon the same general line' as the subsequent definite location of the Northern Pacific between Superior City and Ashland.[3]

The Company had not claimed the lands in place but only the right to select indemnity lands in lieu of those lands, as a later grant was entitled to indemnity for lands taken by an earlier grant in cases when the lines crossed.[4]

The Secretary of the Interior and the Commissioner of the General Land Office rejected the arguments of the Northern Pacific and deducted the lands from the total of the grant.[5]

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[1] Joint Hearings, op. cit., part 1, pp. 411-412.

[2] Ibid., p. 413.

[3] Ibid.

[4] Ibid., parts 2-3, p. 935.

[5] Ibid., part 1a, p. 685.

"5. To deduct the acreage of the error at the Portland terminal--11,424.48"[1]

The error in the terminal at Portland resulted when the Northern Pacific did not construct its road as far into the city as the map of definite location showed. These lands were forfeited under the act of 1890; however, the Northern Pacific had erroneously been credited with the lands until the error was pointed out by McGowan.[2] Actual examination by the Northern Pacific of its records revealed that it received 1,276.64 acres in place lands and a total of 3,237.53 acres. All but 520 acres of this land was sold by 1924 for a total of $17,270.64.[3] The Railroad was willing to concede these acres[4] and this was upheld by the Secretary of the Interior and the Commissioner of the General Land Office.[5] The final deduction at Portland was 4,311.47 acres.[6]

"6. To deduct the acreage of the error at the Ainsworth terminal--41,415.38"[7]

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[1] Ibid., part 1, p. 26.

[2] Ibid., parts 4-5, p. 2171.

[3] Ibid., part 1, pp. 414-415.

[4] Ibid. [5] Ibid., part 1a, p. 685.

[6] Ibid., part 1, p. 400.

[7] Ibid., p. 26.

The error at Ainsworth, Washington, was caused by a mistake in the Land Office which placed the terminal at Ainsworth instead of at Pasco, about three miles west of Ainsworth. This locational error resulted in the assignment of 41,415.38 acres of land to the Northern Pacific in excess of what it should have received. The Northern Pacific agreed to this deduction[1] and it was approved by the Secretary of the Interior and the Commissioner of the General Land Office.[2]

"7. To deduct the error in the primary limits through Montana and Idaho--144,000.00"[3]

The next point was related very closely to this one and was discussed at the same time.

8. To correct the error in the location of the primary first and second indemnity limit lines through Montana and Idaho, thereby releasing over 100,000 acres from the second indemnity limits.[4]

The limits of the grant between Missoula, Montana, and the Idaho border had been placed incorrectly by the Land Office so that 144,000 acres of land were erroneously credited to the Northern Pacific. The limits of the grant had been created before the surveys of the area were made,

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[1] Ibid., p. 415.

[2] Ibid., part 1a, p. 685.

[3] Ibid., part 1, p. 26.

[4] Ibid.

by projecting lines from areas which had been previously surveyed.[1] This error naturally led to errors in the first and second indemnity limits as well. The adjustment of the primary limits brought in the limits of the indemnity belts and brought the transfer of some lands in the primary limit into the first indemnity limit, some lands in the first indemnity limit into the second, and some lands in the second indemnity limit outside the grant entirely. As the error occurred in an area where there were national forests, it had an additional effect by freeing some of the forest lands from the operation of the grant.[2] The total error eventually was set at 166,000 acres.[3] The Northern Pacific rather grudgingly conceded the point.

> The decisions of the land department are uniform in holding that land-grant limits are where the department fixes them, just as section corners are wherever the surveyors place them, right or wrong, and it seems a late date now to inquire into the accuracy of these lines, but we have already advised the Commissioner of the General Land Office that if an error exists in the erroneous designation upon a map of lands to which the company is not entitled, we are prepared to leave the matter in his hands provided vested titles shall not be disturbed.[4]

The Secretary of the Interior approved both deduc-

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[1] Ibid., p. 417.

[2] Ibid., parts 4-5, p. 2201.

[3] Ibid., parts 7-10, p. 5112.

[4] Ibid., part 1, p. 417.

tions along with the Commissioner of the General Land Office but with the stipulation that the area outside the new boundaries which had already been disposed of by the Northern Pacific be used to reduce the deficiency in the grant.[1]

"9. To deduct the acreage of the error at the Kalama terminal--27,000.00"[2]

The situation at Kalama was brought up by McGowan for two reasons. The first:

> (a) That the map of definite location filed September 13, 1873 was superseded in part by a map filed September 22, 1882, and that the latter should govern as to the width of the grant so far as the location indicated by the later map would overlap in the State of Oregon, or the location by the earlier map in the then Territory of Washington.[3]

The significant question here was whether the road was definitely located in a state or territory. The grant was twice as large in a territory as in a state--twenty sections per mile as opposed to ten sections per mile. The position taken by McGowan would have held the Railroad to the route through the State of Oregon and only one-half of the land it received for the route through the Washington Territory. The Railroad and the Commissioner of the General Land Office as well as the Secretary of the Interior

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[1] Ibid., part 1a, p. 685. The total was 8,607.70 acres outside the grant. Ibid., parts 4-5, p. 2198.

[2] Ibid., part 1, p. 26.

[3] Ibid., part 1a, p. 685.

rejected McGowan's argument and agreed that the terminal was based upon the map filed in September of 1873.[1] McGowan was prepared for this decision with his second argument on the Kalama terminal.

The situation was this (Figure 3):

> (b) That the company failed to construct its road from station 107.51 to Kalama, about 2 miles, maintaining between such points a ferry transfer, which connection it is alleged did not comply with the law, in that it lacks permanancy of character, and that because of the failure on the part of the company to construct a permanent connection the grant for this part of the road should be forfeited under the act of September 29, 1890.[2]

McGowan reasoned that if the Northern Pacific had earned the grant by utilizing a ferry boat for the 2 miles at Kalama that it could have used the river for 10, 20, or more miles and still have earned the grant.[3] In the abstract, the argument had merit; however, upon a close examination of the situation at Kalama, McGowan seemed to be reaching for straws. The situation at Kalama was such that the limits of the grant were the same whether the ferry was part of the grant or not because the ferry ran east and west connecting lines which ran north and south. The Secretary of the Interior and the Commissioner of the General Land Office did not agree with McGowan and the Secretary said:

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[1] Ibid.

[2] Ibid.

[3] Ibid., parts 7-10, p. 5114.

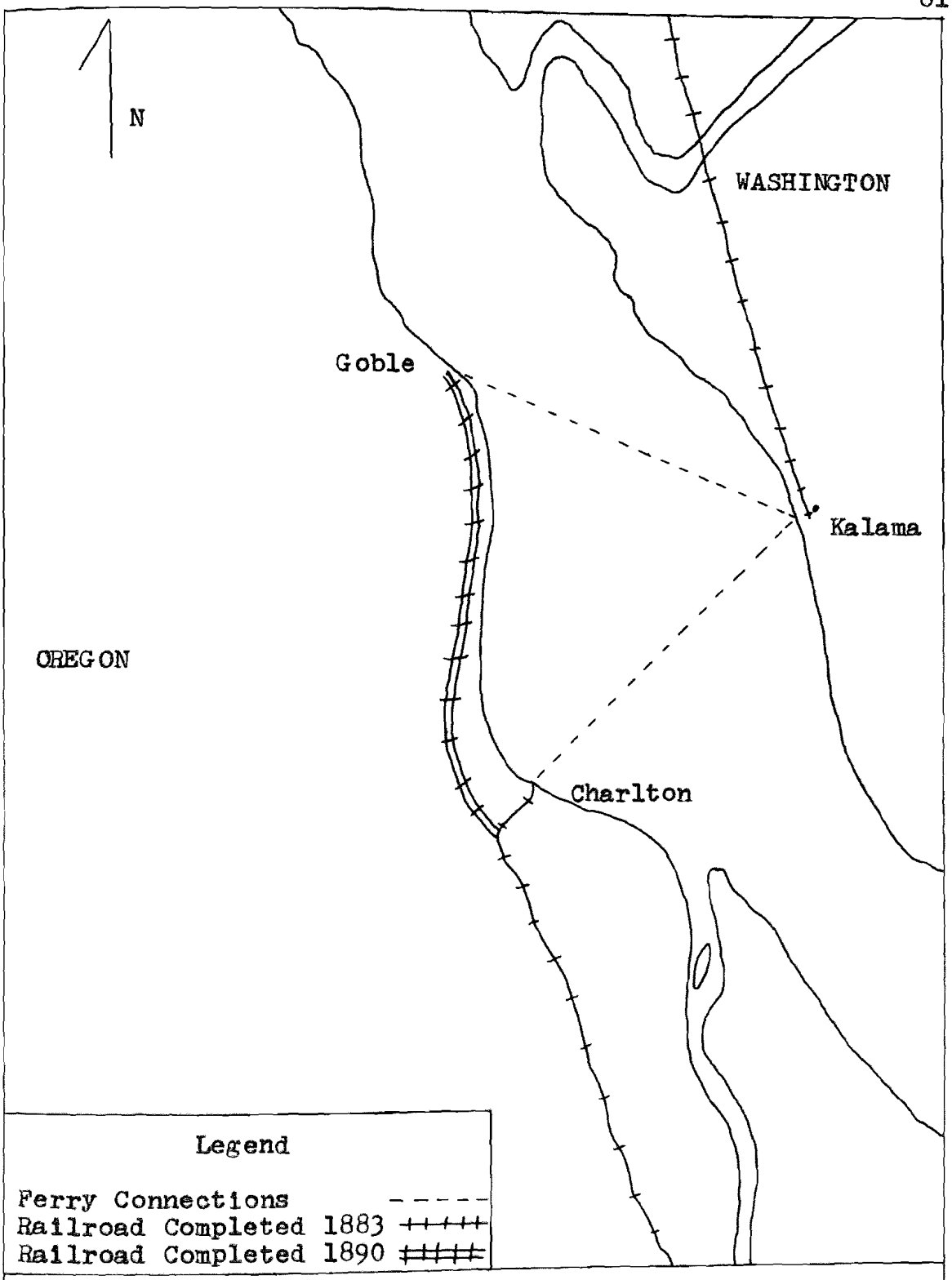

Figure 3. The error at the Kalama Terminal. (From Joint Hearings.)

> With the abutting lines of railroad constructed to either bank, it is not reasonable to hold that a through line has not been constructed because trains are ferried across a river or inlet.[1]

"10. To deduct for the Tacoma overlap--638,450.99"[2]

The tentative adjustment made by the Commissioner of the General Land Office in December of 1923 allowed the Northern Pacific 2,838,958.02 acres under the act of 1870. This was 638,450.99 acres more than the Company was allowed in 1906 as mentioned in 256 U.S. 51, as the Commissioner failed to deduct the area at Tacoma. Tacoma marked the junction of the main line chartered in 1864, and the branch line chartered in 1870 (Figure 4). The question at Tacoma involved the intention of Congress--was there a double grant of land here or had Congress intended for the 1864 line to take it? If Congress intended the double grant of land, the Northern Pacific was to have indemnity selections for the 1870 line to the amount of 638.450.99 acres, and the tentative adjustment of 1923 included these acres in the total intended for the Railroad.[3] The situation was complicated by the provision of the act of 1870 which changed the main line to the road running down the Columbia River and the branch line to the line over the Cascades. McGowan believed

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[1] Ibid., part 1a, p. 685.

[2] Ibid., part 1, p. 26.

[3] Ibid., parts 7-10, pp. 5114-5115.

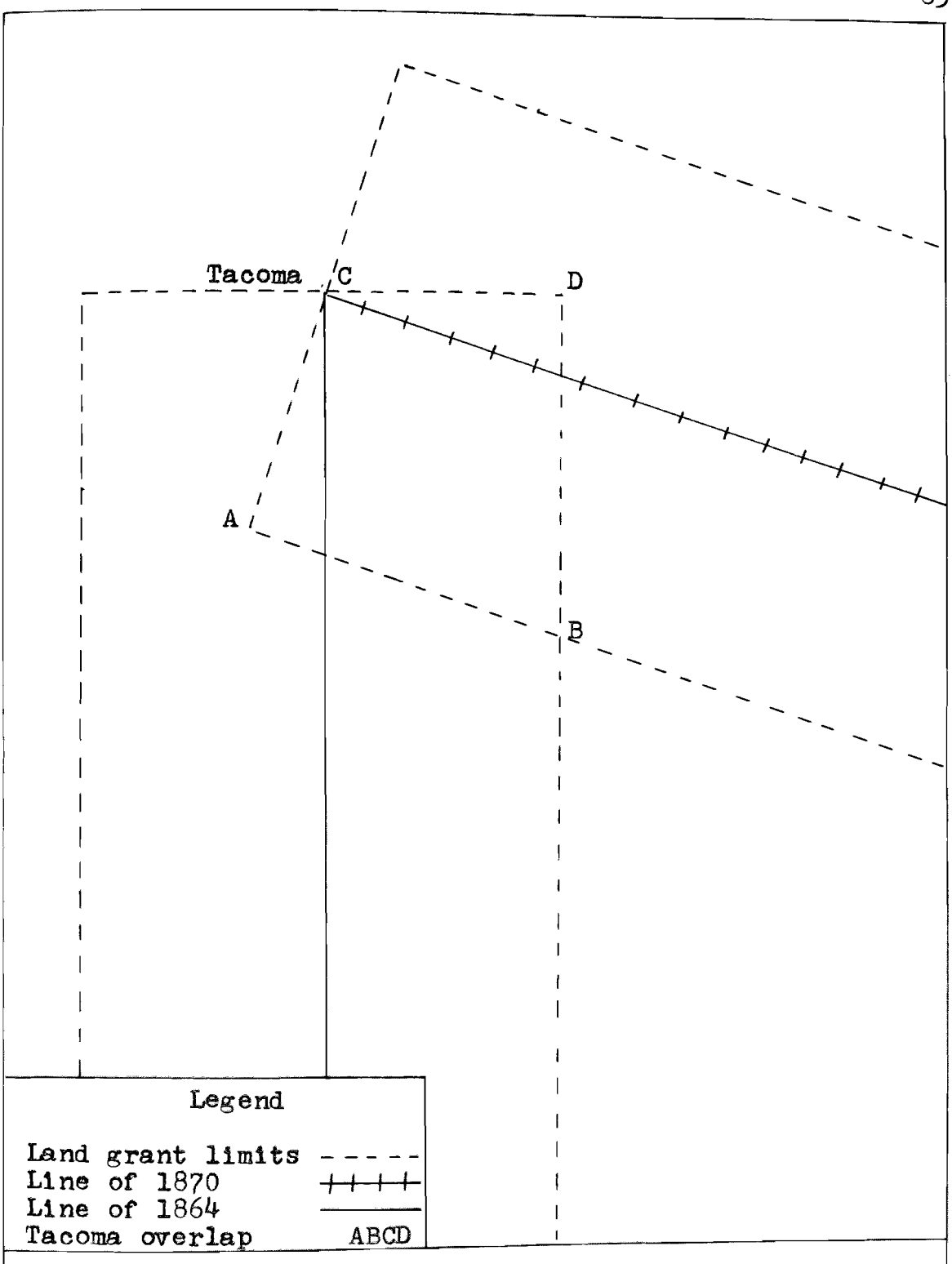

Figure 4. The overlap at Tacoma, Washington, of the two lines of the Northern Pacific Railroad. The area shown bounded by the points ABCD is the actual overlap. (From Joint Hearings.)

that the change of lines meant that all of the construction occurred under the act of 1870. As proof for this contention, McGowan cited the provisions of the acts of 1864 and 1870.[1]

The act of 1864 said:

> And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget's Sound, with a branch, via the valley of the Columbia River, to a point at or near Portland, in the State of Oregon, leaving the main trunk-line at the most suitable place, not more than three hundred miles from its western terminus. . . .[2]

The resolution of 1870 said:

> . . . and also to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound. . . .[3]

McGowan pointed out that the "300 mile" limitation on the branch line of 1864 and the "convenient point" of the resolution of 1870 were far different, and the fact that the

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[1] Ibid., parts 4-5, p. 2250.

[2] 13 U.S. Statutes 366 (1864).

[3] 16 U.S. Statutes 378-379 (1870).

line was built after 1870 meant that the line was built under the terms of the act of 1870.

> This being true, it necessarily follows that the branch line over the Cascade Mountains was not built under the law as it appeared in the act of July 2, 1864, with reference to the 300-mile limitation, but the branch line was constructed under the 'convenient point' words in the joint resolution of May 31, 1870, as all of the construction of that particular piece of branch road was subsequent to May 31, 1870.[1]

Since the two roads were built under the same act and the Supreme Court held in U.S. vs. Oregon and California Railroad, 164 U.S. 526, that in a situation of this type the main line was to receive the lands and the branch line was to get no lands, there was no Tacoma overlap.[2] The correct figure for the area was 637,500.46 acres and this was approved by the General Land Office and the Secretary of the Interior.[3]

The Northern Pacific did not agree that the line from Portland to Tacoma was built under the act of 1870 and that Congress intended to grant lands to aid in the building of both lines. The later grant was to receive indemnity selections for the lands lost to the main line grant of 1864.[4] This statement would have had merit if the grants were to

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[1] Joint Hearings, op. cit., parts 4-5, p. 2250.

[2] Ibid., parts 7-10, p. 5115.

[3] Ibid., part 1a, p. 686.

[4] Ibid., parts 11-12, p. 5434.

different companies but Congress had not intended to make a double grant to the Northern Pacific.

"11. To deduct the excess acreage of the grant through Washington--1,500,000.00"[1]

The main contention by McGowan was that the Northern Pacific should have followed a more direct route along the road from Spokane to Tacoma instead of building south to Wallula and then north and west to Tacoma. The problem arose when the Northern Pacific failed to construct the line down the Columbia from Wallula to Portland and forfeited the land along this route. The Supreme Court in the case of St. Paul and Pacific v. Northern Pacific (139 U.S. 1) said:

> When the termini of a railroad are mentioned, for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line. No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant.[2]

The Northern Pacific line as shown on the map (Figure 5) was anything but direct. There would have been no objection to the route chosen had the Northern Pacific constructed the line down the Columbia River.[3]

McGowan stated:

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[1] Ibid., part 1, p. 26.

[2] St. Paul and Pacific Railroad Company v. Northern Pacific Railroad Company, 139 U.S.1, 13 (1891).

[3] Joint Hearings, op. cit., parts 7-10, p. 5120.

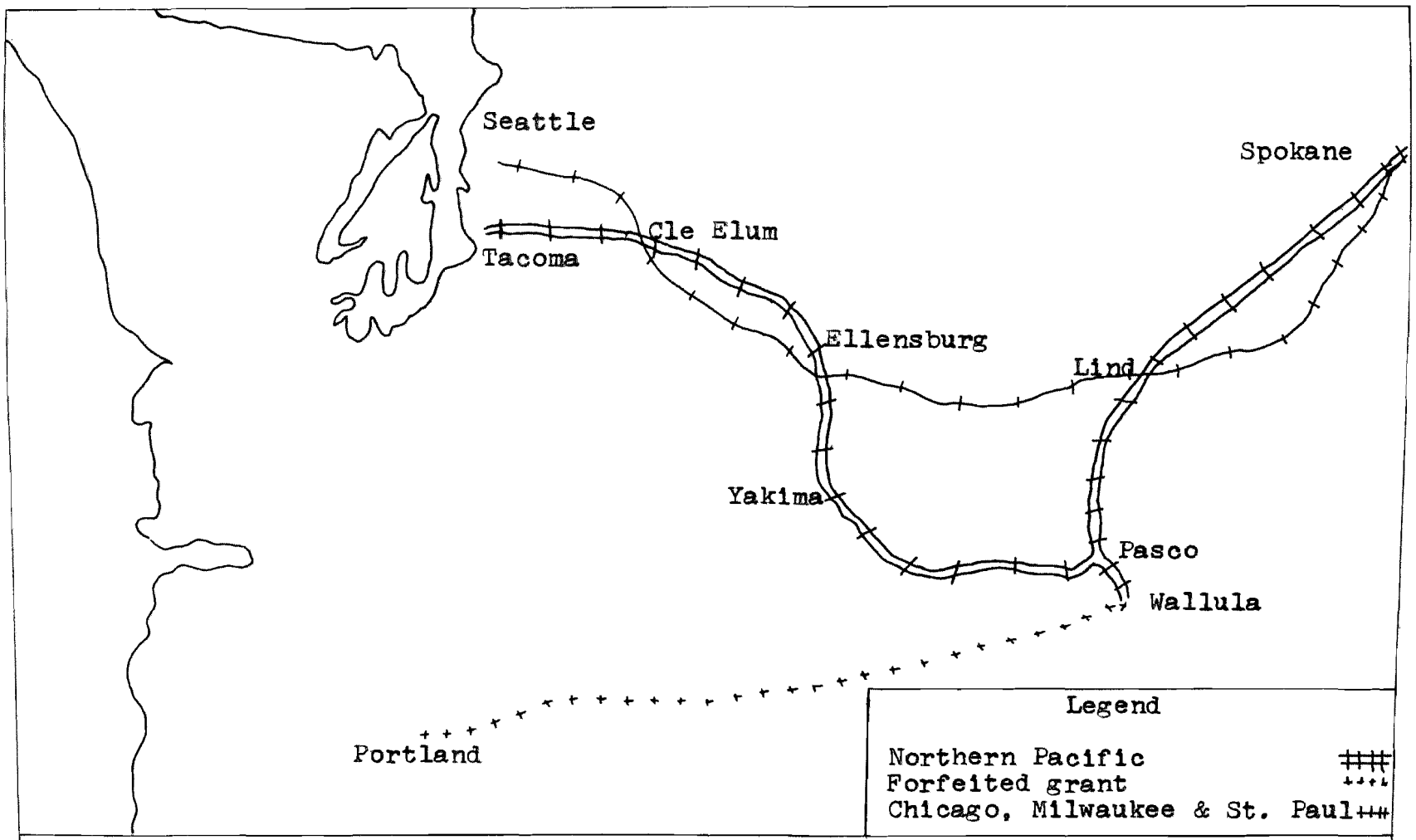

Figure 5. The indirect railroad route of the Northern Pacific through Washington. (From Joint Hearings.)

> If the Secretary of the Interior had known at the time that he approved the map of location of the road from Wallula to Spokane that the company would violate its contract by not building down the Columbia River, the Secretary of the Interior would have had no authority in law to approve a map of definite location such as was finally followed by the Northern Pacific.[1]

The direct route used to compute the acreage was a combination of the routes of the Northern Pacific and the Chicago, Milwaukee and St. Paul as shown on the map, a route which was 82.2 miles shorter than the Northern Pacific between Lind and Ellensburg.[2] When the Northern Pacific filed its map of definite location from Lake Pend d' Oreille to Wallula, the Secretary of the Interior had a map of general route which indicated that the Railroad intended to fulfill the conditions of the grant.[3] If the Northern Pacific had indicated it was not intending to build down the Columbia, the Secretary of the Interior would have been required by 139 U.S. 1 to tell the Northern Pacific to take a more direct route from Spokane to Tacoma.

The Railroad maintained that the route taken was the most suitable at the time and that the Government use of land grant rates and other Government actions indicated the acceptance of the situation.[4]

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[1] Ibid., p. 3598.

[2] Ibid., p. 3606.

[3] Ibid., p. 3617.

[4] Ibid., part 1, pp. 422-423.

The Commissioner of the General Land Office agreed with the railroad.

> Inasmuch as the location of the main line (so far as constructed) and the branch line comply fully with the requirements as set out in the granting act, as amended, and the road as constructed was accepted, it follows that no deduction from said grant can be made by this office based upon a claim that the road as built is not a direct route between the terminal points.[1]

On this statement, the Secretary of the Interior commented:

> If by that he means that the Government is bound by approval of the map of definite location, attention is directed to the decision of the Supreme Court in United States v. Oregon, etc., Railroad (164 U.S. 526), and particularly to language on pages 544-545. I do not, therefore, concur in the conclusion of the Commissioner, but recommend investigation by the committee into this phase of the grant. . . .[2]

12. To show wherein the Northern Pacific defeated its grant under the acts of July 2, 1864, and May 31, 1870, by selections made in the indemnity limits thereof under the acts of July 1, 1898, and Mar. 2, 1899, possibly--75,000.00[3]

The Railroad Company received by acts of July 1, 1898, and March 2, 1899, selection privileges for lands relinquished in the primary limits of the grant. These selection rights were not confined to the indemnity limits of the grant but were good outside the limits of the grant. The Company selected certain areas within the indemnity

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[1] Ibid., p. 377.

[2] Ibid., part 1a, p. 686.

[3] Ibid., part 1, p. 26.

limits and took from itself the right to select these lands as indemnity under the provisions of the granting acts.[1] The point made by McGowan was that the Company, by its own actions, had contributed to the deficiency in the grant and that it was bound by its own act.[2]

The Northern Pacific replied that the lands were selected under the acts of Congress which clearly permitted such selections, and the selections were approved by the Interior Department.[3] Why then should the actions have been questioned when the Northern Pacific had the legal right to do them?

The Commissioner of the General Land Office approved the deduction removing 520 acres from the primary limit of the grant as a result of a selection of these lands in even-numbered sections in the primary limits, 38,007.09 acres from the grant of 1864, and 8,568.29 acres from the grant of 1870 or a total of 46,575.38 acres in the indemnity limits.[4] The Secretary of the Interior also approved the deduction.[5]

14. To show in detail the circumstances surrounding the Wallula overlap act of May 17, 1906, and the resulting benefits to the Northern Pacific and to deduct from the grant the acreage of the main

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[1] Ibid., parts 4-5, pp. 2300-2301.

[2] Ibid., p. 2307.

[3] Ibid., part 1, p. 424.

[4] Ibid., p. 377.

[5] Ibid., part 1a, p. 687.

line moiety lands in the Wallula overlap--590,000.00[1]

The situation at Wallula would have been the same as that at Tacoma had the Northern Pacific completed its contract and built the main line down the Columbia. The main line lands, granted in 1864, were forfeited by the act of 1890 which provided:

> That no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any State or corporation to which lands may have been granted by Congress, except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to confer any right upon any State, corporation or person to lands which were excepted from such grant. Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road, and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines has been completed, inure by virtue of the forfeiture hereby declared to the benefit of the completed line.[2]

Congress, then, thought it had forfeited the moiety lands in the Wallula overlap. At the time of the forfeiture legislation, no map of definite location was filed down the Columbia but there was a general route map filed and this was believed sufficient to identify the lands. On February 23, 1904, the Supreme Court handed down a decision in a case involving the overlap between the line from Port-

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[1] Ibid., part 1, p. 26.

[2] 26 U.S. Statutes 498 (1890).

land to Tacoma and the line which was never built from Wallula to Portland. In that case (193 U.S. 1) the Court held that the general withdrawal map did not sufficiently identify the lands, and that the lands were subject to the Northern Pacific grant of 1870.[1] The decision was then applied by the Department of the Interior to the Wallula overlap as well. McGowan thought this was done in error because both of the lines in question at Wallula were under the grant of 1870. He pointed out that it would have been very simple for Congress to have brought proceedings in mandamus to require the Northern Pacific to file a map of definite location identifying the lands between Wallula and Portland and causing them to fall under the provisions of the forfeiture act of 1890 (Figure 6). Instead of this action, the Northern Pacific was permitted to take the lands in place or in indemnity by the act of May 17, 1906. The indemnity provision was made necessary because between 1890 and the date of 193 U.S. 1, the lands in the overlap were opened to settlement because the Interior Department considered them forfeited. The settlers claimed 179,118.88 acres of land in error and the act of 1906 was passed supposedly in their behalf but the Northern Pacific gained selection rights for those 179,000 acres as well as 298,769

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[1] United States v. Northern Pacific Railroad Company, 193 U.S. 1, 9-10 (1904).

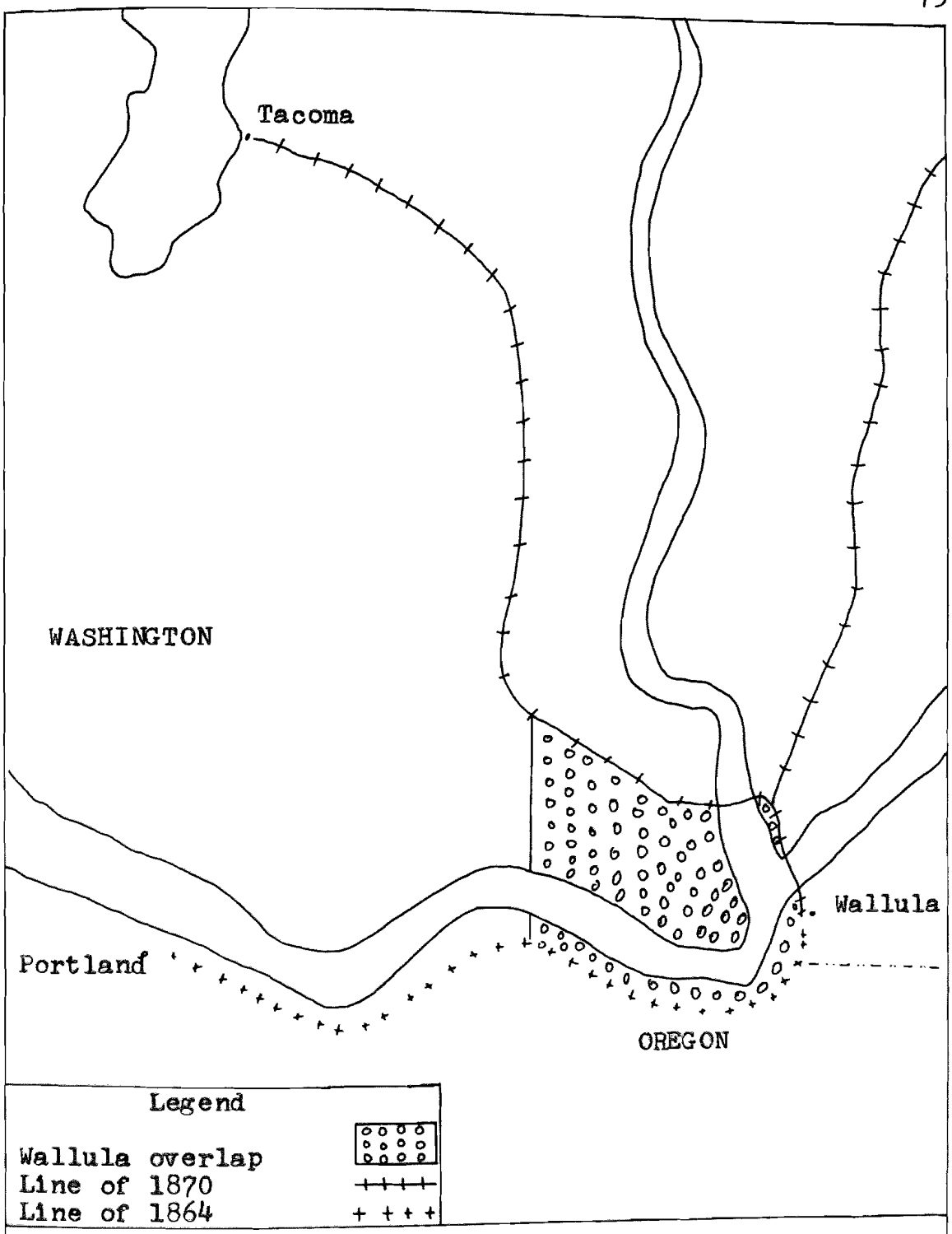

Figure 6. The overlap at Wallula, Washington, showing the general area in conflict between the acts of 1864 and 1870. The line of 1864 was not built and the land grant along it was forfeited. (From Joint Hearings.)

acres in place lands.[1]

McGowan said to the Railroad:

> Congress thought it had forfeited the main line moiety lands in the Wallula overlap by reason of section 6 of the act of September 29, 1890. Unless Congress was apprised fully of the situation and what it could and could not do, it must be assumed when it passed the act of May 17, 1906, it virtually gave you 477,000 acres of land which it thought at least it had forfeited by section 6 of the act of September 29, 1890.[2]

In addition McGowan applied the situation in the Wallula overlap to the over all question of performance by the Railroad.

> The materiality of a discussion of this point, Judge, it seems to me, is to tie into this: The Northern Pacific, of course, takes the position in this matter that the Government has breached its contract. Here is one specific item where Congress certainly had in mind the forfeiture of at least the acreage of the lands as I have given them, and yet by a peculiar situation, that is, the failure of the company to comply with the terms of its contract to file a map of definite location, from Wallula to Portland those lands were not forfeited.[3]

The railroad disagreed with this position and said:

> It is, of course, well settled that where the limits of two grants to two grantees, each of the same date, conflict, a moiety of the lands in the overlap passes to each grantee. In the single respect as to the dates of the grants involved the situation at Wallula differs from that at Portland but obviously this distinction is immaterial if no lands were ever identified as falling under the

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[1] Joint Hearings, op. cit., parts 4-5, pp. 2380-2384.

[2] Ibid., pp. 2383-2384.

[3] Ibid., p. 2388.

> operation of the grant in aid of the line from Wallula to Portland.[1]

The Commissioner of the General Land Office agreed with the Railroad as did the Secretary of the Interior. The Secretary said, however:

> If, in the opinion of the committee, proceedings as to the alleged moiety lands of the alleged overlap should be had, an appropriate act of Congress would probably be a prerequisite to action in the courts.[2]

The Congress failed badly in 1906 when it gave the additional rights of selection to the Northern Pacific. The Northern Pacific failed to adhere to its contract and because of this obtained 300,000 additional acres of land.

"16. To reconsider whether Crow Indian Reservation losses could be satisfied in the second indemnity belt--1,300,000.00"[3]

The point at issue involved the right of the Northern Pacific to make selections in the second indemnity limits in this particular case as in points 1, 2, and 3. If the Railroad was prevented from entering the second indemnity limits, the selections for 1,300,000 acres of land in the second limit were made in error and could have been subtracted from the shortage. The second indemnity limits were

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[1] Ibid., part 1, p. 427.

[2] Ibid., part 1a, p. 687.

[3] Ibid., part 1, p. 26.

included in the act of 1870 and were only used to replace losses in the primary limits subsequent to July 2, 1864.[1] Two treaties with the Crow, the treaties of September 17, 1851, and May 7, 1868 provided the situation for controversy. If the lands were included in the treaty of 1851, then the Northern Pacific was confined to the first indemnity limit for losses; if 1868, then the lands could have been taken in the second indemnity limit.

The Commissioner of the General Land Office concluded that the Treaty of 1851 had never been formally ratified by Congress and the settled construction of the Interior Department held that the Treaty of 1868 created the reservation. The primary reason for establishing the second indemnity limit in Montana was to satisfy losses in the Crow Reservation.[2] The Secretary of the Interior was not so certain and recommended that Congress hear the parties and decide upon the measure.[3] The Committee reached no definite conclusion in this dispute.

The result of the measures considered was the reduction of the deficiency in the Northern Pacific grant by about 1,300,000 acres and the removal of some of the indemnity lands from selection by the railroad. According

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[1] Ibid., parts 7-10, p. 5167.

[2] Ibid., part 1, p. 378.

[3] Ibid., part 1a, p. 688.

to the Commissioner of the General Land Office, the adjustment of 1925 showed the gross area of the primary limits of the act of July 2, 1864, as 40,960,511.38 acres. From this 370,378.05 acres was deducted for the land along the route of the Portage, Winnebago and Superior Railroad, and a deduction of 13,312 acres for the estimated area included in the Montana primary limits not corrected by the new maps, leaving a net area of 40,576,821.33 acres. The gross area of the primary limits of the grant of May 31, 1870, was 2,827,319.47 acres from which was deducted 637,500.46 acres for the Tacoma overlap leaving a net of 2,189,819.01 acres. The Company had received as of December 31, 1921, 38,439,100.09 acres under the act of 1864 and 1,608,176.30 acres under the act of 1870. The deficiency under the act of 1864 was 2,137,721.24 acres from which 38,527.09 acres was deducted for lieu lands selected by the Company in its own limits, bringing the net deficiency to 2,099,194.15 acres; and under the act of 1870, the deficiency was 581,642.71 acres from which was deducted 8,568.29 acres for the same reason, reducing the deficit to 573,074.42 acres.[1] These deductions by the Commissioner were in direct response to the points and arguments of McGowan.

It was still necessary for Congress to take action if

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[1] Ibid., part 1, p. 372.

the remaining deficit were to be removed and the rest of the forest reserve lands were to be saved. The errors in the grant were corrected, but the real questions of nonperformance by the Northern Pacific were concentrated in the remainder of the 22 points.

CHAPTER IV

THE CONGRESSIONAL PHASE: PART II

The changes in the tentative adjustment made by the Commissioner of the General Land Office in response to McGowan's letter were only part of the total picture. There was still a deficiency in the grant which needed Congressional action to nullify the Northern Pacific's claim to additional land. The hearings held by the Joint Committee reached no conclusions on the specific issues raised, but the decision by the Committee to retain the lands indicated its feelings on the matter. McGowan succeeded in convincing Congress that the Northern Pacific had failed to complete its part of the bargain and that the forest lands should be retained for the United States. Most of the questions which will be discussed in this chapter were not adjusted by the General Land Office or the Secretary of the Interior because they were outside the authority of administrative officers. They did not deal with acreage but were questions of excess value received by the Northern Pacific in addition to the original grant, and the failure by the Northern Pacific to comply with the provisions of the grant.

McGowan summed up this position well when he told the Committee:

> I understand, of course, that some of the matters I have touched upon will not appeal to you as being properly within the adjustment of the grant as you have undertaken it, yet they are a part of the grant to the same extent as the acres thereof. The $2.50 sales provision is as vital a section of the grant as any other portion.[1]

The arguments between McGowan and James B. Kerr, the spokesman for the Northern Pacific, were often highly complex and legalistic with no final resolution of the issues. They were important, however, to an extent not attributable to those mentioned in Chapter III because they dealt with actions by the Northern Pacific, some of which involved the possibility of fraud, rather than mistakes by the General Land Office or Congress.

> 13. To show the great additional values received by the Northern Pacific under the act of Mar. 2, 1899, the act of July 1, 1898, and extensions thereof and other so-called relief acts.[2]

The primary aim of McGowan was to set up a balance sheet between the values the Northern Pacific had received and the benefits which Congress had intended at the time it granted the lands for the construction of the Railroad. He was convinced that the situation called for the settlement

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[1] United States Congress, Joint Committee on the Investigation of the Northern Pacific Railroad Land Grants, Hearings Before the Joint Congressional Committee on the Investigation of the Northern Pacific Railroad Land Grants (Part 1 of 15 parts; Washington: Government Printing Office, 1925-1928), p. 27. This will hereafter be referred to as Joint Hearings.

[2] Ibid., p. 26.

of the grant on an equitable basis rather than the legal basis stated in 256 U.S. 51. This must be kept in mind in the examination of this point and those that follow.

The act of July 1, 1898 was designed to aid the settler who had settled in any part of the Northern Pacific land grant in the case where land was purchased from the United States in good faith. The Railroad was permitted to select lieu lands in any state into which the grant extended to replace these lands lost to the settlers.[1]

This act permitted the selection of lands in many areas beyond the indemnity limits of the grant. Even so, it was not open to abuse to the extent of the act of 1899, but McGowan reported receipts of $3,773,655.56 for 439,220.73 acres of land selected by the Northern Pacific in lieu of lands lost under the act of 1898 indicating that the lands selected were very valuable.[2]

The act of March 2, 1899, provided for the establishment of the Mount Rainier National Park in an area which fell inside the limits of the Northern Pacific grant. The act creating the Park contained a provision for the exchange of lands in the Park for other lands.

> . . . said company is hereby authorized to select an equal quantity of nonmineral public lands, so

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[1] 30 U.S. Statutes 620 (1898).

[2] Joint Hearings, op. cit., parts 7-10, p. 5132.

> classified as nonmineral at the time of actual Government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any State into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States.[1]

The practical effect of this provision was to permit the exchange of large areas of worthless mountain tops and glaciers in the Park for valuable lands elsewhere.

> It was once stated in Congress that the railroad relinquished 450,000 acres of land within three days after the Mount Rainier Act was signed. Many people wanted the park established for perfectly good reasons, but this provision of the act suggests that it was drawn under careful supervision of agents of the Northern Pacific. . . .[2]

Whether this charge was true or not, the Northern Pacific received valuable lands for the worthless lands in the Park.

The Wallula Overlap act of May 17, 1906 was discussed in Chapter III (Point 14). The general position taken by McGowan in respect to each of these acts was that the excess value of the land received was consideration for adjustment of the grant.

> Conceding that the act of July 2, 1864, and the joint resolution of May 31, 1870, were on the basis of acres, it is submitted that these tremendous

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[1] 30 U.S. Statutes 994 (1899).

[2] John Ise, Our National Park Policy: A Critical History (Baltimore: John Hopkins Press, 1961), pp. 121-122.

> values the Northern Pacific has received by reason of these additional acts, can not be disregarded in any comprehensive determination of the respective rights of the Northern Pacific and the United States, arising out of the land grants.[1]

The General Land Office was not involved with this point as it required action beyond the authority of the Office.[2]

The Secretary of the Interior indicated that no legal grounds existed for settling this point but perhaps a court of equity would take this into account.[3]

The Northern Pacific indicated that it felt the inquiry into the value of the lands was immaterial.

> It seems that in his argument on this point the Acting Forester is confused by another suggestion which he advances and which will be considered below, namely, that the Northern Pacific grant was one of money or value whereas it was in fact a grant of a quantity of lands in which no question of value was involved.[4]

Congress failed in the wording of the various acts to require equal value as well as equal area for lieu selections, opening the door for abuse of the selection rights.

15. To show the full facts covering the erroneous classification of mineral lands under the act of Feb. 26, 1895, and the effect of this classification upon the lands of the United States with a

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[1] Joint Hearings, op. cit., parts 7-10, p. 5132.

[2] Ibid., part 1, p. 378.

[3] Ibid., part 1a, p. 687.

[4] Ibid., part 1, p. 426.

> view to eliminating the unsatisfied mineral losses from the deficiency figures--2,250,000.00[1]

The point of erroneous mineral classification was the most extensively debated question raised by McGowan. The Northern Pacific was prohibited from taking mineral lands in place or indemnity by the granting acts of 1864 and 1870, and was entitled to take lieu lands to replace the mineral lands lost. There were approximately 3,800,000 acres of land classified as mineral over the entire grant, and the Northern Pacific had selected approximately 1,600,000 acres by 1925 to replace these losses. This left about 2,200,000 acres which were yet to be selected.[2] The adjustment of the grant made by the General Land Office in 1925 indicated a deficit of about 2,600,000 acres in the grant so that most of this deficit was caused by unselected mineral lieu lands.

McGowan had this to say on the mineral land question:

> That in so far as this mineral land classification is concerned, it was a piece of work that resulted in very great damage to the United States, in that large areas of nonmineral land of very low value, mountain tops, high hills, the Alpine type, were classified as mineral, and thereby lost to the Northern Pacific grant; for those lands the Northern Pacific received an indemnity right to select nonmineral lands in their indemnity limits.[3]

As one remedy for this situation McGowan proposed establishing that the value of the 1,600,000 acres already

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[1] Ibid., p. 26. [2] Ibid., parts 4-5, p. 1844.

[3] Ibid., parts 2-3, p. 1057.

chosen equal the value of the lands lost and that consequently the grant was satisfied.[1] Although this idea was mentioned frequently in his testimony, he concentrated upon showing that the national forest lands could be saved by defining more carefully the lands which were subject to indemnity selection and showing that much of the classification was erroneous, and in fact, fraudulent.

The granting act of 1864 provided that in lieu of mineral lands lost, the Northern Pacific was to select "a like quantity of unoccupied and unappropriated agricultural lands".[2] The Interior Department had, in the past, construed agricultural to be synonymous with nonmineral, but McGowan felt this was done in error. In accordance with the indemnity provision of the act of 1864, if the lands in the forests were not agricultural lands, then the Northern Pacific could not select them in lieu of lost mineral lands.[3]

This construction of the law, if accepted, meant that the forest reserve lands for the most part were exempt from

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[1] Ibid.

[2] United States Congress, House, Committee on the Public Lands, The Northern Pacific Land Grant, Hearings before Committee, 68th Congress, 1st Session, on H.J.Res. 183, (Part 1 of 5 parts; Washington: Government Printing Office, 1924), p. 94. This will hereafter be referred to as House Hearings.

[3] Joint Hearings, op. cit., parts 4-5, p. 2439.

selection under the grant.

The second point of attack tried to prove the value of the lands already selected equal to the total value of the shortage, and indicated the inaccuracy with which the classification was made. E. A. Sherman, the Chief Forester, indicated that the department was not accusing the Northern Pacific of fraud but the hearings did not bear this contention out.

The mineral classifications in question were made under the provisions of the act of February 26, 1895, by a three man commission. These commissioners were not always the most qualified persons for the job, and they were accompanied by experts from the Northern Pacific. The Northern Pacific had the worthless land classified as mineral and the valuable land as nonmineral.[1]

The act of 1895 provided:

> That as to the lands against the classification whereof no protest shall have been filed as hereinbefore provided, the classification, when approved by the Secretary of the Interior, shall be considered final, except in case of fraud. . . .[2]

The mineral controversy then provided two alternatives--either prove fraud or get Congress to provide for a reclassification of the mineral lands.

The Forest Department called in several of its

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[1] Ibid., p. 2451.

[2] 28 U.S. Statutes 685 (1895).

mineral experts to testify before the Joint Committee on the actual status of the lands classified as mineral. The report given to the Committee showed that of the 3,800,000 acres classified as mineral lands during the 30 years since the passage of the act, there were entries under the mining laws to only 65,000 acres indicating that much of the land classified as mineral was not properly classified.[1] In addition, testimony by W. M. H. Woodward and C. A. McElroy, mineral experts with the Forest Service, established the approximate error in the classification at 80 per cent.[2]

How did the land happen to be so poorly classified and what role did the Northern Pacific play in the classification? The persons who classified the land were described by H. H. Schwartz, the Chief of Field Services for the Land Office.

> The appointment of the commissioners under this act was political. The two nonresident commissioners in each district were usually elderly men appointed from the Southern States, and, of course, had absolutely no knowledge of mineral or mineral land indications in Montana or Idaho. The resident members of the board were supposed to have been selected with some regard for their mineral knowledge but were really selected by reason of political consideration. It followed from all this that the board itself did not have within it the knowledge or intelligence to make a proper classification.[3]

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[1] Joint Hearings, op. cit., parts 4-5, p. 2465.

[2] Ibid., p. 1786; Ibid., p. 1791.

[3] Ibid., p. 2481.

This ignorance of mineral indications, coupled with the presence of the Northern Pacific representatives, tended to create mineral land where there was none. In addition, 732,147.84 acres in the first indemnity limit and 454,716.18 acres in the second indemnity limit were classified as mineral removing them from the possibility of selection by the Northern Pacific.[1] This was not such a large acreage, but if it were only 20 per cent mineral as the estimate of the examiners indicated, the deficiency in the grant would have been greatly lessened because this land would have been available for lieu selections.

A statement by H. G. Ade, of the United States Forest Service, concerning the same area of the grant as the statements by Woodward and McElroy established that the lieu lands selected were, as of 1924, 7.9 times as valuable as the lands lost.[2]

The question of fraud on the part of the Northern Pacific was investigated by calling witnesses who were in the employ of the Northern Pacific and others who were mineral commissioners. In Lamb et al, against Northern Pacific Railroad Co. (29 Land Decisions 102), it was held that if the commissioners did not personally examine the land it constituted fraud. The report made by the commis-

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[1] Ibid., p. 2487.

[2] Ibid., p. 1837.

sioners contained the phrase: "the lands were personally examined by the board and no traces of mineral formation were found".[1]

> If they did not make such personal examination, their report is equally fraudulent, inasmuch as it asserted that they did so examine them; it was an assertion of 'positive knowledge of what they did not know' and comes within Lord Kenyon's definition, supra, of a 'legal fraud,'. . . .[2]

McGowan then produced testimony to indicate that the commissioners could not have examined all of the area, for the act required that each 40 acre subdivision be examined by the commissioners.[3] A great quantity of the land in Montana was supposedly examined in the wintertime when it was under heavy snow cover and it was impossible to determine the nature of the lands.[4]

The Northern Pacific, wishing some of the mineral classifications changed because of the presence of valuable timberlands substantiated this claim in a brief dated August 2, 1906 filed with the Commissioner of the General Land Office.

> . . . The company has at all times claimed the physical impossibility of an examination of the lands in question during the fall and winter months, although it will appear from the detailed reports

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[1] Ibid., parts 7-10, p. 2451.

[2] Ibid., parts 4-5, p. 2452.

[3] Ibid., p. 2453.

[4] Ibid., parts 7-10, p. 3837.

> of the mineral land commissioners that during the time of year when this land was at least 10 feet under snow, they personally examined the same on foot, and they were able from such examination to classify the land as mineral.[1]

The land in question was 288,000 acres, but the protest was subsequently withdrawn for 31,000 acres which were practically devoid of timber values.[2]

James W. Edwards, who from 1882 to 1898 was with the Northern Pacific in the position of chief land examiner and appraiser offered some interesting information about one of the groups of commissioners in the Coeur d' Alene district. John B. Goode and A. A. Crane, two of the three commissioners had a timber contract with the Northern Pacific for ties and poles at the time they were mineral commissioners.[3] The classifications were not made by the commissioners, but by the men in the employ of the Northern Pacific who recommended valuable lands as nonmineral and nonvaluable lands as mineral.[4]

A. A. Crane testified that the examiners were not on all of the land that was classified, but that they reported to the Secretary of the Interior that they had made a personal examination of the lands.[5] Crane also testified that the commissioners classified land where timber was good

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[1] Ibid., p. 3876.

[2] Ibid., p. 3877.

[3] Ibid., p. 3725.

[4] Ibid., p. 3728.

[5] Ibid., p. 3968.

as nonmineral and land where there was no timber as mineral land.[1]

The Montana Mining Association conducted an investigation in 1908 into the mineral classification and reported:

> The railway company gained title to a large area of valuable timberland that is unquestionably mineral in character, while at the same time it got rid of thousands of acres of worthless land that was unsalable and devoid of mineral deposits. For all this worthless land it received rich agricultural and profitable timber lands in lieu of the worthless lands surrendered to the Government.[2]

The conclusion reached by the Association was unfavorable to the Northern Pacific.

> . . . the members of this committee unhesitatingly declare as their firm belief that the mineral land classification made in Montana is absurd, worthless, and fraught with injury and injustice to the miners, prospectors, mining interests, and the people of the State in general; that it is tainted with fraud and collusion, and was largely manipulated by the Northern Pacific Railway Co. and its paid agents and attorneys. . . .[3]

The Montana Legislature passed a resolution March 4, 1909, which showed the opinions of the legislature on the question.

> Resolved by the Legislative Assembly of the State of Montana, the Senate Concurring, That we humbly petition and request of the National Congress that it pass an act providing for a just, honest and thorough mineral reclassification of all lands of the State of Montana within the Northern Pacific land grant.[4]

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[1] Ibid., p. 3965.

[2] Ibid., p. 4126.

[3] Ibid., p. 4129.

[4] Ibid., p. 4130.

The Northern Pacific maintained that the decision by the Secretary of the Interior to approve the classification was binding except in the case of fraud and that fraud was not present.[1] This did not seem to be the case as the evidence produced by McGowan clearly indicated fraud. The failure of the commissioners to examine the land personally indicated fraud even if the actions of the Northern Pacific were disregarded. It would have appeared that the United States had sufficient cause to overturn the mineral classification and recover damages for the lost lands.

> "17. To show the values that have been lost to the United States under the act of Mar . 2, 1896, for lands erroneously patented to the Northern Pacific."[2]

The act of March 2, 1896, provided for the extension of a statute of limitations for canceling patents issued in error to the Northern Pacific. It continued the provisions of the acts of March 3, 1887 and March 3, 1891 which provided for the recovery of no more than the minimum government price of $1.25 per acre from the grantee if the lands were sold to a bona fide purchaser.[3] McGowan wondered why

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[1] Ibid., part 1, pp. 428-429.

[2] Ibid., p. 26.

[3] 24 U.S. Statutes 557 (1887); 26 U.S. Statutes 1093 (1891); 29 U.S. Statutes 42-43 (1896).

the Northern Pacific was allowed to retain the difference between the money received by the Railroad and the minimum price. The Northern Pacific replied by stating the unreasonableness of opening a question which was closed for 30 years.[1] The Secretary of the Interior did not believe that the difference in prices could have taken into account in the adjustment of the grant.[2] Congress again had failed in the drafting of legislation to provide for proper consideration of the rights of the United States.

18. To deduct from the Northern Pacific grant an area equal to the acreage sold under the 1875 foreclosure proceedings at private sale in violation of the public sale provision of the joint resolution of May 31, 1870--838,852[3]

The next point was very closely related to this and both were discussed at the same time.

19. To show whether or not the Northern Pacific complied with the sales provision of the joint resolution of May 31, 1870, requiring the company to dispose of certain of its lands at not more than $2.50 per acre.[4]

The financial troubles of the Northern Pacific relating to the Panic of 1873 resulted in a reorganization of the Railroad in 1875. The Northern Pacific, at that time, sold 838,852 acres of patented or certified lands back to itself.

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[1] Joint Hearings, op. cit., part 1, p. 431.

[2] Ibid., part 1a, p. 689.

[3] Ibid., part 1, p. 26.

[4] Ibid., p. 27.

One provision of the act of 1870 was:

> . . . and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceeding, or the mortgaged lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situate, after not less than sixty days' previous notice, in single sections or subdivisions thereof, to the highest and best bidder. . . .[1]

The Northern Pacific mortgage was foreclosed on May 12, 1875, and all property except the patented or certified lands was sold back to the company. That foreclosure decree, as amended, directed the sale of all of the property except the lands which had been patented or certified, and the sale took place on August 12, 1875.[2]

Later, the receiver, George W. Cass, the former president of the Northern Pacific, and Jay Cooke and Charlemagne Tower as trustees, conveyed the 838,852 acres of patented or certified lands to Frederick Billings, the president of the Railroad.[3] A question arose as to whether the actual franchise as a corporation was properly transferred and so in 1882, the reorganization committee executed a deed conveying all the property including the franchise.[4]

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[1] 16 U.S. Statutes 379 (1870).

[2] Joint Hearings, op. cit., parts 2-3, p. 1179.

[3] Ibid.

[4] Ibid.

McGowan's point was the failure to sell the lands at public sale in the States and Territories in single sections or less but instead, retention of all the lands by the Northern Pacific by a private transaction, violated the provisions of the act of 1870.

In addition to the patented or certified lands there were 3,694,506 acres of surveyed land in the Northern Pacific grant in 1875 for which the Railroad had not paid the survey fees and which McGowan felt should have been sold in the required manner.[1]

The Northern Pacific defended the action in 1875 vigorously. James B. Kerr, the general counsel for the Railroad, pointed out that the lands in question were located in Minnesota and in Cass County, Dakota, the eastern-most county in the territory, and that the provisions of the joint resolution of 1870 with respect to the sale of lands only applied to the lands granted by that act.[2]

> Provided, that all lands hereby granted to said company. . . .
>
> And if the mortgage hereby authorized shall at any time be enforced. . . . such lands shall be sold at public sale. . . .[3]

The only lands granted in 1870 were the lands from

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[1] Ibid., parts 7-10, p. 5175.

[2] Ibid., parts 2-3, p. 1181.

[3] 16 U.S. Statutes 379 (1870).

Tacoma to Portland so none of the lands mentioned by McGowan fell under the operation of the restrictive provision. The indemnity lands were not included in the question because the Supreme Court in the case of Hewitt v. Schultz (180 U.S. 139) held that the indemnity lands were not considered "lands hereby granted".[1] The lands in the region from Tacoma to Portland were granted by the joint resolution but they were lands which had not had the survey fees paid and which still legally belonged to the United States. Thus, they were not under the operation of the provision requiring public sale.[2]

The second point raised by Kerr indicated that the lands were not sold by the Northern Pacific but were sold by the receiver, George Cass, under the direction of the Circuit Court of the United States for the Southern District of New York.[3]

> The whole violation of the joint resolution so frequently talked of in the brief of the Acting Forester is based on the erroneous and quite curious notion that the provision in the joint resolution gave direction as to sale of the 838,852 acres of land. . . .[4]

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[1] Hewitt v. Schultz 180 U.S. 139 (1901).

[2] Joint Hearings, op. cit., parts 2-3, p. 1185.

[3] Ibid., p. 1183.

[4] Ibid., part 1, p. 435.

N. J. Sinnott, the chairman of the Joint Committee replied to these arguments:

> That will enable me to state what has been bothering me--and I have stated it before in the hearings--that Congress, under your theory, in the act of May 31, 1870, provides drastic sale provisions for the 2,800,000 acres, and provides--makes no provision at all for the sale of the 40,000,000 acres in the very act giving authority to mortgage the 40,000,000 acres and the 2,800,000 acres, and it has always troubled me to think that Congress was so lax in the matter.[1]

The same idea applied to the foreclosure of 1896, but in that case, the lands were listed in single sections. When the lands were sold, the Railway Company bought all of the lands and paid for them with the securities of the Railroad Company--securities that were of no value. As far as McGowan was able to determine, all of the lands of the Railroad Company were retained by the Railway Company in 1896.[2]

The Supreme Court in the Oregon and California case held that a similar provision to the $2.50 restriction was an enforcable covenant and that the railroad was required to follow the instructions.[3]

In regard to the phrase, "lands hereby granted", McGowan indicated his awareness of the controversy about the interpretation. However, the claims did apply to those

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[1] Ibid., parts 2-3, p. 1232.

[2] Ibid., parts 4-5, pp. 2130-2132.

[3] United States v. Oregon & C.R. Co. et al, 186 F. Rptr. 861 (1911).

lands which the Northern Pacific was willing to admit were granted and they were not disposed of according to the provisions in 1896.[1]

The Northern Pacific also contended that the foreclosure of 1896 extinguished the preemption right under the 1870 resolution.[2] The act provided:

> . . . that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and preemption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre. . . .[3]

The Northern Pacific maintained that this provision only applied to the Portland-Tacoma place lands and that these lands were subject to mortgage until 1896 and therefore not under the provision quoted above.[4]

The Commissioner of the General Land Office indicated that his office had no authority to handle the case under the decision of Heath v. Northern Pacific Railway Company (38 L.D. 77).[5] The Secretary of the Interior indicated that the Heath case was superceeded by the Oregon and California

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[1] Joint Hearings, op. cit., part 1, p. 151.

[2] Ibid., p. 438.

[3] 16 U.S. Statutes 379 (1870).

[4] Joint Hearings, op. cit., part 1, p. 436.

[5] Ibid., p. 379.

case and that the question was still open.[1]

McGowan summed up his position:

> The plan of reorganization of March 16, 1896, never intended there should be a bona fide sale of the land grant, and the facts as I have related them show that there never was a bona fide sale of the land grant in conformity with the provisions of the joint resolution of May 31, 1870, that upon the foreclosure of the mortgage the lands should be sold in single sections or subdivisions thereof to the highest and best bidder. Not a foot of these lands ever went into the hands of a third person.
>
> Why did the Northern Pacific go through all this camouflage in connection with the so-called public sale of the lands in 1896? Not because the mortgages required the lands to be sold in that manner. The proceedings were amicable. They did it because they knew of the requirement in the resolution of May 31, 1870, that upon the foreclosure of the mortgages, which they say were authorized by the resolution, that they had to meet the requirements of the law, but they did not meet the requirements of the law. They knew of the requirements of the resolution, but these they specifically and intentionally evaded.[2]

The case made by McGowan was very convincing in pointing out the efforts the Northern Pacific took to evade the restrictive provisions of the grant. This failure by the Northern Pacific should have been grounds for eliminating the entire shortage in the grant.

20. To show the extent to which the Northern Pacific expended the funds Congress authorized it to raise by the sale of bonds for purposes other than the construction of the railroad contem-

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[1] Ibid., part 1a, p. 689.

[2] Ibid., parts 7-10, pp. 5240-5241.

> plated by the act of July 2, 1864, and the resolution of May 31, 1870.[1]

McGowan's position was that the Northern Pacific built feeder lines and otherwise diverted funds and materials from the main line. The mortgage authorized by the act of 1870 was for the purpose of building the main line and any diversion of funds was a breach of the contract.

> If they elected to go ahead and build those branch lines, and by reason of that fact they lost lands within their primary or indemnity limits, it does not seem that they can blow hot and blow cold on the same proposition, and say, 'Here is a shortage in our grant that is caused, at least in part, by our failure to go ahead and build the main line.'[2]

The Northern Pacific maintained that the branch lines were not against the intention of Congress because they were necessary for the sale of the land grant.[3]

Neither the Commissioner of the General Land Office nor the Secretary of the Interior felt that they were able to recommend action.[4]

It seemed unrealistic for McGowan to question the diversion of funds in this case for reasonable business practices by the Northern Pacific.

"21. To show the length of road not constructed within the time specified by law and the acreage oppo-

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[1] Ibid., part 1, p. 27.

[2] Ibid., p. 165.

[3] Ibid., p. 441.

[4] Ibid., part 1a, p. 689.

site the same."[1]

The early forfeiture movement and the failure to construct the line on time was discussed in Chapter II. The length of road not constructed in the time specified was 1,732.31 miles with about 25,000,000 acres of land opposite the uncompleted line.[2]

The Northern Pacific took the position that the Government's failure to comply with its own requirement to survey the grant; the acceptance of the road by the Government; and the waiver of the right of forfeiture, made it impossible to declare a forfeiture of the lands.[3] According to the Northern Pacific, the forfeiture of 1890 was an implied declaration that there was to be no forfeiture of lands opposite roads which were actually built, and numerous other acts--totaling 23--showed the acceptance of the Northern Pacific as built.[4] The land in the indemnity limits was not reserved for the Railroad, (Hewitt v. Schultz, 180 U.S. 139), and could not be selected until surveyed; therefore, the failure by the United States to survey the lands as required by section six of the granting act of 1864, caused the shortage in the grant.[5] In addition, the United States received reduced land grant rates

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[1] Ibid., part 1, p. 27.

[2] Ibid., p. 379.

[3] Ibid., p. 408.

[4] Ibid., part 1, p. 442.

[5] Ibid., part 1, p. 446.

for Governmental services to the amount of $13,824,162.33 as of January 1, 1924.

> And the Government's claim and receipt of these rate reductions from 1876, a period extending over nearly half a century, is conclusive that failure to complete on time was waived.[1]

There was a section in the granting act of 1864 which provided for the alteration of the grant, but it was very qualified and did not give the United States the power to appropriate the rights of the Northern Pacific.[2]

> . . . congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend, or repeal this act.[3]

The Forest Service attack on these arguments by the Northern Pacific was very effective. McGowan quoted the United States v. Oregon & California Railroad Co. in regard to the forfeiture act of 1890.

> It is urged that, under the rule 'Expressio unius est exclusio alterius,' the act operates as a declaration of waiver of forfeiture as to all lands opposite the completed portions of all railroads.
>
> . . . So Congress could not have intended, by the act under discussion, to confirm the grants here concerned against any condition subsequent that might have been annexed to them, and if not intending so to do, the act could not operate as a waiver of forfeiture of condition subsequent, if broken.[4]

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[1] Ibid., p. 448.

[2] Ibid., pp. 449-450.

[3] 13 U. S. Statutes 372 (1864).

[4] United States v. Oregon & C.R. Co. et al, 186 F. Rptr. 861, 889 (1911).

In addition, the case indicated that the issuance of patents by the Land Office was not a waiver, nor were acts by executive officers, nor the acceptance and use of the road by the Government. Laches are not imputable to the Government and the statutes of limitation of the acts of 1891 and 1896 did not estop the Government from enforcement of the condition subsequent.[1]

The Supreme Court in 238 U.S. 393 said:

> We may observe again that the acts of Congress are laws as well as grants and have the constancy of laws as well as their command and are operative and obligatory until repealed. This comment applies to and answers all the other contentions of the railroad company based on waiver, acquiescence and estoppel and even to the defense of laches and the statute of limitations. The laws which are urged as giving such defenses and as taking away or modifying the remedies under review have no application.[2]

The question of the failure to survey was also vigorously attacked by McGowan. As of 1878, there were 13,849,920 acres of odd-numbered sections of land surveyed in the Northern Pacific grant or about one-third of the total.[3] The act of July 15, 1870, required the Northern

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[1] United States v. Oregon & C.R. Co. et al, 186 F. Rptr. 861 (1911). Laches are unreasonable delay in asserting a right; waiver in voluntarily giving up a right; estoppel is forbidding the contradiction of an earlier position.

[2] Oregon & California Railroad Company v. United States 238 U.S. 393, 427 (1915).

[3] Joint Hearings, op. cit., parts 4-5, p. 2059.

Pacific to pay the cost of survey--the Railroad refused and took the case to the courts. The case of Northern Pacific v. Traill County (115 U.S. 600) decided on December 7, 1885, settled the question in favor of the United States. Even though the case was being tried in the courts and the Northern Pacific was withholding the cost of survey, nearly one-third of the grant was surveyed.[1] The Northern Pacific had refused to comply with a Congressional directive and used this failure as an excuse for not building the road, while at the same time blaming the United States for the failure to survey. As if this weren't reason enough to disregard the arguments of the Northern Pacific, the case of Atlantic and Pacific v. Mingus (165 U.S. 441) held that:

> It is finally contended that the Government failed to fulfill its obligation to survey the lands, and that this was a condition precedent to its right to declare a forfeiture.
>
> . . . Evidently the failure to do this did not prevent the company from realizing the full value of the land granted by mortgaging the road, and it is open to doubt whether it could, under any circumstances, be insisted upon as a defense to the forfeiture.[2]

The road was completed after the time limit and the court added:

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[1] Northern Pacific R.R. Co. v. Traill County 115 U.S. 600 (1885).

[2] Atlantic and Pacific Railroad Company v. Mingus 165 U.S. 413, 441 (1897).

> So far as the road was built and accepted by the Government after that time, it was probably entitled to receive its appropriate land grant, but this was rather a matter of favor than of strict right.[1]

Even though all this was true, the failure to survey had no practical effect on the loss of lands in the primary limits because of the withdrawal of the land from entry by the general route maps and the maps of definite location filed by the Northern Pacific. Under the general route map, which was in the nature of a preliminary map, the odd-numbered sections in the primary limits were withdrawn from settlement. The map of definite location then confirmed the general route. The general route withdrawal was later held illegal in 1904, but by then, the definite location maps were filed and the lands withdrawn by them. The lands had been improperly held for the Northern Pacific.[2] In addition, the Department of the Interior erroneously withdrew indemnity lands from entry until August 2, 1888, an action improperly protecting the Northern Pacific.[3] These illegal actions set up values which should have been taken into account in adjusting the grant.

This issue of disposal of lands enumerated better than any other the general defensive position taken by the

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[1] Ibid., p. 442.

[2] Joint Hearings, op. cit., parts 4-5, pp. 2083-2085.

[3] Ibid., p. 2097.

Northern Pacific. McGowan, in attacking this position, exposed the flagrant abuses of the Railroad.

> 22. To deduct from the grant all areas of error now included therein instead of including these areas as being properly in the grant and using them as a set--off against the deficiency.[1]

This point was not the subject of controversy and needed no further comment.

At the conclusion of the hearings which had lasted two years, McGowan proposed forfeiture legislation to retain all the lands in the national forests for the United States and compensate the Northern Pacific for all lands which the United States was not entitled to recover by forfeiture.[2] The Attorney General was to institute a suit in the courts for settlement of the controversy under the proposed bill.[3]

After 94 days of hearings and some 5,500 pages of testimony, the Joint Committee prepared a bill along the lines of the suggestions by McGowan and presented it to the respective Houses by unanimous agreement.[4]

McGowan had succeeded in persuading Congress to save the forest reserves. On February 8, 1928, the Attorney

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[1] Ibid., part 1, p. 27.

[2] Ibid., parts 7-10, p. 5324.

[3] Ibid., p. 5330.

[4] Congressional Record (Washington: Government Printing Office, 1929), Vol. 70, part 5, p. 5120.

General of the United States sent a memorandum to the Joint Committee concurring on the recommended action by Congress and holding that the United States had the right of forfeiture.[1] The bill was not approved in 1928 but was delayed until June 25, 1929.[2] It was approved on that day marking the end of the Congressional phase and the beginning of the final phase--the hearing and settlement of the case by the courts.

Throughout the Congressional phase, the influence of McGowan could not be overlooked. The Commissioner of the General Land Office was persuaded to correct certain errors in the grant which were not handled by the first tentative adjustment saving about 1,300,000 acres of land. McGowan then presented testimony which convinced the Congressional Committee that the lands should be held even if they had to be paid for. To McGowan then, must go the credit for the retention of a valuable natural resource. Since the lands were retained by the United States by the passage of the bill, the original goal of the investigation was achieved. What remained was a determination of whether the past performances by the Northern Pacific disentitled it to any compensation for the lands retained by the United States.

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[1] Ibid., p. 5122.

[2] 46 U.S. Statutes 44 (1929).

CHAPTER V

THE JUDICIAL PHASE

The Congressional investigative phase was ended with the passage of the act of June 25, 1929. The roles of the Forest Department and McGowan were almost over at the same time as the Justice Department took over the prosecution of the case. The forest lands were saved but the question of compensation for them remained. The Forest Department helped in the preparation of the Government's case and the influence of McGowan remained until the final settlement.[1]

> The Forest Service cooperated extensively with the Department of Justice in assembling record and status data, examining and evaluating the national-forest lands involved, reviewing earlier classifications of the lands, and in other essential features of the preliminary proceedings.[2]

The courts handled the matter until the final settlement announced on August 28, 1941, by the District Court for the Eastern District of Washington. Although the final settlement was embodied in a court decision, the settlement was reached because of a combination of legislative and judicial pressure brought on the Northern Pacific.

The District Court decision of 1939, was almost entirely in favor of the Northern Pacific, but the Supreme

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[1] Report of the Forester (Washington: Government Printing Office, 1931), p. 30.

[2] Ibid.

Court, in 1940, reversed parts of the lower court decision and sent the case back to the District Court for further hearings on the points reversed. At that point, the United States Congress passed the Transportation Act of 1940 which provided for the ending of land grant rates on certain Governmental material in return for the surrender of claims by the land grant railroads for lands which they had not yet received. The Northern Pacific evidently saw the possibility of a substantial loss in court as well as the loss of the reduced rates promised by the Transportation Act of 1940 for giving up claims to the land, and decided to settle with the United States.

As the authority for the judicial phase was given by the act of June 25, 1929, a knowledge of some of the provisions included in this act was necessary for an understanding of the purpose of this phase. The act was intended to alter and amend the act of 1864 and the joint resolution of 1870 by providing for the retention by the United States of all lands within the indemnity limits of the Northern Pacific grant, which, on June 5, 1924, were within the national forests or other Government reservations.[1] The actual status of the grant was still in doubt because the Secretary of the Interior was required to withhold his

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[1] 46 U.S. Statutes 41-2 (1929).

approval of the adjustment of the grant by this 1929 legislation. If there were a shortage in the grant, the United States was to pay the Northern Pacific.

> That for any or all of the aforesaid indemnity lands hereby retained by the United States under this Act the Northern Pacific Railroad Company or its successor, the Northern Pacific Railway Company, or any subsidiary of either or both, or any subsidiary of a subsidiary of either or both, shall be entitled to and shall receive compensation from the United States to the extent and in the amounts, if any, the courts hold that compensation is due from the United States.[1]

Section two of the act provided for the forfeiture to the United States of all of the unsatisfied indemnity rights and any claims to additional lands in the grant under the original granting acts.[2]

Congress evidently provided for compensation, if any were due, because it knew that the Northern Pacific would have contested the forfeiture in the courts. The provision for compensation made it appear as if the United States was considering the rights of the Railroad.

The Attorney General was instructed to institute suits to recover any lands which were erroneously acquired by the Northern Pacific and to have the courts consider the extent to which the United States and the Northern Pacific performed their parts of the agreement:

> . . . including the legal effect of the fore-

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[1] Ibid., p. 42. [2] Ibid.

> closure of any and all mortgages which said Northern Pacific Railroad Company claims to have placed on said granted lands by virtue of authority conferred in the said resolution of May 31, 1870, and the extent to which said proceedings and foreclosures meet the requirements of said resolution with respect to the disposition of said granted lands, and relative to what lands, if any, have been wrongfully or erroneously patented or certified to said companies, or either of them, as the result of fraud, mistake of law or fact, or through legislative or administrative misaprehension as to the proper construction of said grants or Acts supplemental or relating thereto. . . .
>
> . . . and all other questions of law and fact presented to the joint congressional committee.[1]

The Secretary of the Interior was instructed to withhold the approval of the adjustment of the land grant and to withhold the issuance of any further patents or muniments of title until the final settlement of the dispute by the courts.[2]

The Attorney General filed the suit in the District Court for the Eastern District of Washington on July 31, 1930, as directed by Congress, to determine whether the Northern Pacific was entitled to compensation for the lands forfeited. The Northern Pacific and trustees under certain of the mortgages filed motions to dismiss the Government's case and these motions were referred to a special master who heard testimony on the points and made recommendations to the court. The court, after ruling on the master's first

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[1] Ibid., p. 43.

[2] Ibid., p. 44.

recommendations, again referred the case to the master for testimony on the points which had not been dismissed. The master reported that the indemnity lands which were withdrawn by the United States for forest reserves properly belonged to the Northern Pacific and that the Company was entitled to compensation for these lands.[1]

In 1939, the District Court found the Northern Pacific entitled to compensation for 1,453,061.02 acres of land and entitled to patents for 428,986.68 acres of other land. The United States was entitled to compensation for 65,829.77 acres of land which were erroneously patented to the Northern Pacific.[2]

> The court reserved for future decision the contentions of the mortgagees that they are purchasers for value whose rights cannot be affected by the Government's claim and also ascertainment of the amount to be awarded to the company.[3]

Even though the Northern Pacific was judged entitled to lands by the District Court, little by little, the amount of land to which the Northern Pacific was entitled was being reduced. The previous amounts were in the tentative adjustment of December 23, 1924, 3,900,000 acres; in the adjustment of 1925, 2,600,000 acres; and in the District Court

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[1] United States v. Northern Pac. Ry. Co. et al, 41 F. Supp. 273 (1941), p. 280.

[2] Ibid., p. 276.

[3] United States v. Northern Pac. Ry. Co. et al. 61 S. Ct. 264, 272 (1940).

decision only 1,453,061 acres plus the patents for 428,986 acres. The work of McGowan and the Joint Committee had clearly paid off.

After the first round of decisions by the special master, Congress passed an act on May 22, 1936, which authorized a direct appeal of the case by either party to the Supreme Court. A final decision by the District Court was a long time in coming, but when it was announced in 1939, both parties made use of the act of 1936 and appealed to the Supreme Court. The case was argued before the Supreme Court in March and October of 1940, and the decision was announced on December 16, 1940.[1]

Most of the points raised by McGowan during the Congressional Hearings were either rejected by the Supreme Court or were not decided because the eight justices who heard the case were equally divided in their opinions.[2] The ninth justice, Justice Murphy, was involved in the earlier phase of the case in his position as attorney general and so took no part in the case.[3] There were, however, some points made by the United States which the Supreme Court felt were valid. The first of these was the fraud in the mineral classification which McGowan established for the Joint Com-

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[1] Ibid., p. 264.

[2] Ibid., p. 276.

[3] United States v. Northern Pac. Ry. Co. et al, 41 F. Supp. 273, 276 (1941).

mittee. In this instance, the Supreme Court disagreed with the lower court.

> The company moved to dismiss the paragraph and in its answer denied the allegations. The master recommended that the motion be sustained and the court so ordered. In this we think there was error.[1]

The Supreme Court held that the burden of proof was on the United States which was not barred by laches or estoppel from proving the fraud. In order to give the United States the opportunity to prove fraud, the case was remanded to the District Court.[2]

> It may be that on the trial the Government's evidence will prove fraud on the part of the company of such a character and extent as would disentitle the latter to any award. . . .[3]

The Court said, however, that it felt that the report of the mineral commissioners and the Secretary's approval of it created a "prima facie showing in favor of the classification and the company's selection of indemnity lands."[4] This would have not prevented the United States from proving fraud but it was perhaps an indication that fraud would have been difficult to prove.

A second point in the favor of the United States was the failure by the Northern Pacific to open the lands

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[1] United States v. Northern Pac. Ry. Co. et al. 61 S. Ct. 264, 282 (1940).

[2] Ibid., p. 283.

[3] Ibid.

[4] Ibid.

granted by the joint resolution of May 31, 1870, to settlement and preemption as required by the act. The Court held that the provision applied only to the lands granted by the resolution, i.e. Portland to Tacoma, but that these were required to have been opened to settlers five years from the completion of the entire road in 1887, even if the lands were under a mortgage, and: ". . .that its failure so to do was a breach of its contract with the United States. . . ."[1] The District Court was instructed to reinstate this provision and give the United States an opportunity to prove damages.[2]

Two areas which received only incidental mention in the hearings when compared to the attention given the 22 points provided the United States with perhaps its best chance to defeat the entire claim of the Northern Pacific. The first of these was the proper definition of agricultural lands which were to have been taken to replace mineral losses. The granting act of 1864 provided:

> That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road and within fifty miles thereof (41 L.D. 571), may be selected as

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[1] Ibid., p. 287.

[2] Ibid., p. 288.

above provided. . . .[1]

The practice of considering agricultural synonymous with nonmineral was cited by the Supreme Court as an incorrect procedure, and the District Court was overruled on this point. The Supreme Court held that:

> . . . it may not take lands valuable solely for timber or for other uses which would not justify preemption or homestead settlement under the land laws as contemporaneously understood and administered. The company's right of selection in the forest reserves is limited to such land as would, under the practice of the Land Office, have been available to individuals under the public land laws. . . .[2]

This part of the case was then remanded to the District Court for the determination of the characteristics of the lands which were withdrawn for the national forests.

Another opportunity for action by the United States was in the area of the excess value received by the Northern Pacific when the place lands and the indemnity lands were illegally withdrawn from entry by the Interior Department. The withdrawal of the lands upon the filing of the general

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[1]United States Congress, House, Committee on the Public Lands, The Northern Pacific Land Grant, Hearings before Committee, 68th Congress, 1st Session, on H.J. Res. 183, (Part 1 of 5 parts; Washington: Government Printing Office, 1924), p. 94. This will hereafter be referred to as House Hearings.

[2]United States v. Northern Pac. Ry. Co. et al. 61 S. Ct. 264, 285-286 (1940).

route map was held illegal in 1904.[1] Indemnity lands were also withdrawn until August 2, 1888, when it was held that this practice was illegal.[2] The lands nearest to the line of the railroad were the most valuable so the Northern Pacific had reserved for it the lands which would have been taken first by the settlers if the lands were not withdrawn. The District Court had approved the motion to strike the issue from the case but the Supreme Court ordered it reinstated.

> The proof of these alleged advantages gained or losses suffered may be difficult. This is for development at the hearing. The proof, however, must be of financial detriment to the United States or of financial benefit to the company.[3]

The Northern Pacific appealed part of the District Court decision to the Supreme Court and this was part of the same decision. The Northern Pacific claimed the right to indemnity selection for the Tacoma overlap which was deducted by the Secretary of the Interior in the adjustment of the grant in 1925 and upheld by the District Court. The

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[1] United States Congress, Joint Committee on the Investigation of the Northern Pacific Railroad Land Grants, Hearings Before the Joint Congressional Committee on the Investigation of the Northern Pacific Railroad Land Grants (Parts 4-5 of 15 parts; Washington: Government Printing Office, 1925-1928), pp. 2083-2085. This will hereafter be referred to as Joint Hearings.

[2] Ibid., p. 2097.

[3] United States v. Northern Pac. Ry. Co. et al. 61 S. Ct. 264, 287 (1940).

Supreme Court upheld the decision because:

> The grant of 1864, carried title to the lands within the overlap to the company and, therefore, Congress could not and did not make a second grant of the same lands in 1870.
>
> . . . We think it clear that Congress did not intend to confer a right to indemnity upon the company which would give it lands double in quantity at the point of intersection of two of its lines.[1]

The practical effect of the Supreme Court decision was to keep open the Government's case against the Northern Pacific and made possible the final recovery of the lands without compensation. The District Court decision was almost entirely in the favor of the Northern Pacific, but after the Supreme Court reversal, the United States was given the opportunity to prove fraud, to prove the extent of excess value received by the Northern Pacific, and to have the classification of lands reexamined. After the decision, consultations were begun between the United States and the Northern Pacific for the settlement of the dispute by agreement rather than having it settled by the courts. It was very clear that the United States was going to upset at least some of the award made to the Northern Pacific by the District Court.

Additional pressure to settle the conflict had been applied to the Northern Pacific by Congress when it passed

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[1] Ibid., p. 291.

the Transportation Act of 1940 which removed certain land grant rates. The movement for the repeal of the land grant rates began in 1938 when railroad earnings were at a very low level. The agitation resulted in the modification of the agreements to transport Government traffic at reduced rates and was made official by the Transportation Act of 1940.[1] In this act, the United States agreed to pay full commercial rates for transportation except for:

> . . . military or naval property of the United States moving for military or naval and not for civil use or to the transportation of members of the military or naval forces of the United States (or of property of such members) when such members are traveling on official duty; and the rate determined by the Interstate Commerce Commission as reasonable therefor shall be paid for the transportation by railroad of the United States mail. . . .[2]

This provided welcome relief for the land grant railroads but several, including the Northern Pacific, were not to be beneficiaries of the act unless they gave up their claims to lands granted and not yet received. They had to file a release of these claims with the Secretary of the Interior within one year after the passage of the act, and this release was to be:

> A release of any claim it may have against the United States to lands, interests in lands, compen-

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[1] David M. Ellis, "Land Grant Rates, 1850-1945," The Journal of Land and Public Utility Economics," XXI (August, 1945), 216-218.

[2] 54 U.S. Statutes 954 (1940).

> sation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest. . . .[1]

The Northern Pacific was being pursued from two sides--by the threat of the court action, and by the promise of the ending of the land grant rates if the claims to land and compensation were given up. As a result of the pressure, the Northern Pacific intensified bargaining with the United States to reach a settlement of the dispute. An agreement was reached on April 11, 1941, which was in the form of a stipulation to be submitted to the District Court for its approval.[2] This stipulation provided for the release of lands claimed in Washington, Montana, Idaho, Oregon, North Dakota, Minnesota, Wisconsin, and Wyoming to the extent of about 4,500,000 acres and was approved by Secretary of the Interior Ickes on April 19, 1941.[3] The stipulation was sent to the Chairman of the Congressional Committees on the Public Lands to give them an opportunity to object to the provisions. If no objections were received by June 16, 1941, the stipulation was to be given to the District Court and to take effect when approval was given by

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[1] Ibid.

[2] United States v. Northern Pac. Ry. Co. et al, 41 F. Supp. 273, 278 (1941).

[3] New York Times, April 20, 1941, p. 41.

the court.[1] No objections were received and the stipulation was handed to the court.

The Northern Pacific agreed to give up its claim for the 1,453,061.02 acres of land which the District Court had awarded to the Railroad in 1939 and relinquish its claim to the 2,900,000 acres which had already been denied it by the courts. The Northern Pacific also agreed to give up claim to 363,000 acres of the 428,986.68 acres which the District Court awarded it. The remainder of this land was in the hands of bona fide purchasers whose title was not to be invalidated. The Company also agreed to pay the United States $300,000 in compensation. In return for these concessions, the United States agreed to give up its claim against the Northern Pacific for lands erroneously patented; give up its claim for damages resulting from the violation of the $2.50 sales provision of the act of 1870; and give up its claim for damages resulting from illegal withdrawal of place and indemnity lands.[2]

The District Court still had to approve the stipulation before it was to take effect. Judge Schwellenbach of the District Court was very careful to examine the case closely because the circumstances were unusual.

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[1] United States v. Northern Pac. Ry. Co. et al, 41 F. Supp. 273, 291 (1941).

[2] Ibid., p. 287.

> This case, however, has two characteristics which are not usually found in ordinary litigation. In the first place, the public interest is involved to a very high degree and, second, the action was started in compliance with and as the direct result of an Act of the Congress of the United States.[1]

The major question on the Judge's mind was whether approval by Congress was necessary before the stipulation could take effect. The authorization act of 1929 which began the judicial phase contained no express requirement of approval by Congress. At the same time, the act had not anticipated a settlement of the dispute between the parties by agreement rather than dictation by the courts.[2] The attorney general in his letter to the Vice President of the United States transmitting the stipulation as required by the act of 1929 said:

> In my judgement, settlement upon the basis of the terms set forth in the stipulation is for the best interest of the United States. The Secretary of Agriculture concurs in this view and the Secretary of the Interior has advised me that he has no objection to the settlement providing Congress authorizes me to settle on the basis proposed.[3]

The statement by the attorney general in regard to the opinion of the Secretary of the Interior that Congressional authorization might be necessary was the point under consideration by the Judge. After listening to the arguments of the parties, the Judge decided he would sign the

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[1] Ibid., p. 278.

[2] Ibid., p. 280.

[3] Ibid., p. 287.

decree and that prior approval by Congress was not necessary.[1]

The effective date of the decree was August 28, 1941, and on this date, the forest reserve controversy ended. The New York Times printed:

> The famous case of the United States against the Northern Pacific Railway Company, which has involved litigation and Congressional investigation since Civil War days, has been settled under the terms of a decree handed down in the Federal Court for the Eastern District of Washington. . . .[2]

This decree ended the controversy which began with the 1921 decision by the Supreme Court. The United States succeeded in retaining the national forest lands and in doing this without compensating the Northern Pacific. The judicial phase which had begun with setbacks to the United States in the decisions of the special master and the District Court in 1939, ended with a victory because of the reversal of some of the points by the Supreme Court in 1940, and the remanding of the case to the District Court. In addition, the Transportation Act of 1940 with its promise of the ending of land grant rates for surrender of claims to land, helped to convince the Northern Pacific to settle with the United States. The final result of the judicial phase was a victory by the United States over the Northern Pacific.

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[1] Ibid., p. 284.

[2] New York Times, August 30, 1941, p. 17.

CHAPTER VI

CONCLUSION

The final settlement of the case, the approval of the settlement by the District Court in 1941, brought the forest reserve controversy to an end. Although the settlement of the case took twenty years, the final result justified the effort expended. The findings in the Supreme Court case decided in 1921 which awarded forest reserve lands to the Northern Pacific took no notice of the performance by the Railroad of its part of the contract. It was only the diligence of D. F. McGowan and others in keeping the case alive that permitted the eventual victory by the United States. McGowan persuaded the General Land Office to correct errors in the administration of the grant, and by that method reduced the total deficiency in the grant. Congress was persuaded by McGowan and persons in the executive branch of the Government to investigate the nonperformance by the Northern Pacific of its part of the agreement. In the course of the Congressional investigation, McGowan brought out evidence to support his claim that the Northern Pacific was not entitled to any additional land--evidence which convinced the committee to adopt his idea to forfeit the remaining claims of the Northern Pacific to land and institute a suite to determine whether the Northern Pacific was

entitled to compensation for the forfeited lands. Although the final phase of the case was handled by the courts, McGowan and his forces had guided the case to the point where the original goal of retaining the forest lands was attained. The Supreme Court reversal of parts of the District Court decision of 1939 left the way open for the United States to overturn the decision to award compensation to the Northern Pacific for the lands forfeited by the legislation of 1929. Before the District Court could act on the points remanded by the Supreme Court in 1940, the stipulation which settled the case was drawn up and approved by the Northern Pacific and the United States. The judicial developments in 1940 and the impact of the Transportation Act of 1940 and its repeal of the land grant rates caused the Northern Pacific to settle the case on terms favorable to the United States. The Northern Pacific gave up its claim to the national forest lands and its claim to compensation as well as agreeing to pay a cash award to the United States. The original situation of 1921 with the forest reserve lands awarded to the Northern Pacific was reversed.

The settlement of the case on the basis of the stipulation marked a victory for the United States. It was not a victory in the sense that the forest lands were retained by the United States, as that was the case in 1929 with the passage of the act which began the judicial phase. It was

in the denial of compensation for the lost lands that the victory was won. The main point of the entire investigation was whether the United States was required to perform all of the conditions of the agreement, granting the lands, while it was evident that the Northern Pacific had been lax in performing some of its part. The finding by the Supreme Court in 1940 indicated that the practices of the Northern Pacific were to be taken into account in the adjustment of the grant. Even though the United States was not given the opportunity to prove the case because of the settlement, and even though the case was going to be difficult to prove, the mere recognition of the situation by the Supreme Court marked a victory for the United States, for the position was very different from that taken by the courts in the previous cases.

The concept of the public interest being involved in the status of the lands was mentioned in the controversy but this was not taken into account by the courts in rendering their decisions. The Government was not viewed as an agent of the people but simply as a body of rules and laws which applied to the land grants. President Coolidge, Judge Schwellenbach, and the Secretaries of Agriculture and Interior made mention of the concept and it was also mentioned at times in the hearings, but the attitude of the public interest was missing from much of the controversy.

In a very real sense then, the termination of the case was not technically a victory for the public interest but simply one of law. The victory of law was the recognition that the Northern Pacific was held to its obligation to fulfill the terms of the grant. The public interest was served by the outcome of the case but only because it happened to be coincident with the preservation of the national forests.

The main goal of McGowan--to circumvent the decision in 256 U.S. 51 and save the forest lands was achieved and so a personal victory for him was a result of the final decision. Not only had the forest lands been saved, but the Northern Pacific was forced to give up claims for lands over and above the forest lands.

Some of the luster of the final result dimmed when the influence of the removal of the land grant rates was considered. The Northern Pacific did not give up the lands without compensation in the form of increased rates paid by the United States. In the long run, from a purely monetary point of view, the Northern Pacific actually profited by giving up its claims to the lands in question.

In another sense--the long term gain for the people of the United States produced by the preservation of a small part of the remaining public domain--it has turned out to have been a good bargain. It would have been very difficult for the United States to establish the amount of the added

value received by the Northern Pacific in the areas which were to have gone back to the District Court in 1940 for hearings and for this reason, it was a wise settlement by the United States. The Northern Pacific was not harmed by the agreement as the estimated amount of the receipts from all land grant sources was about $136,000,000 and the cost of the line from Ashland, Wisconsin, to Tacoma, Washington, was $70,000,000.[1]

The entire Northern Pacific land grant history was marred by poor judgement on the part of some of the officials of the United States. That the grant was poorly administered was shown by the changes in the tentative adjustment made by the Commissioner of the General Land Office in 1925 in response to the points made by McGowan regarding mistakes by the Land Office.

Congress was also guilty of many errors of judgement which gave the Northern Pacific additional values beyond those contained in the granting act of 1864 and the joint resolution of 1870. The Northern Pacific most certainly could have been built under these two acts without the additional modifications. Congress, along with the courts,

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[1] United States Congress, Joint Committee on the Investigation of the Northern Pacific Railroad Land Grants, Hearings Before the Joint Congressional Committee on the Investigation of the Northern Pacific Railroad Land Grants (Parts 4-5 of 15 parts; Washington: Government Printing Office, 1925-1928), pp. 2016-2017.

closed its eyes to the many violations of the agreements by the Northern Pacific. Northern Pacific influence was present in the Congress although difficult to prove. Mineral land fraud was evidently common knowledge in the areas in which the lands were located as the testimony before the Joint Committee regarding Montana clearly showed, but no action was taken. The Northern Pacific, throughout the history of the grant, engaged in fraudulent practices, the mineral classification being the outstanding example. The original grant was far more generous than it needed to be and the Northern Pacific increased the value by its improper actions. It was impossible to know where the credit for originating the mineral practices was to be placed, whether it was a decision by the executives of the Railroad or by the agents in the field, however, because of the wide spread abuses, it appeared to have been a high level decision.

Congress was certainly aware of the results which some of the act it passed created. The Mount Rainier Park Act of 1899 clearly gave additional value to the Railroad as did the acts which limited the United States to the minimum government price for the lands which were erroneously patented to the Northern Pacific and which were sold by the company.

Despite all of this, the final result must have

brought satisfaction to many persons in the United States who saw for the first time the victory, even if a somewhat nebulous one, by the United States over the Northern Pacific and most of all, it must have brought great satisfaction to D. F. McGowan, the man most responsible for the victory. As for the Northern Pacific, it did not suffer greatly by the final decision as it received far more than the cost of the road from the land that it sold.

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